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In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

ALLAN WAYNE MORTON

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

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QUESTION PRESENTED

Whether, when the federal government, acting pursuant to 42 U.S.C. (Supp. V) 659, honors a facially valid writ of garnishment issued by a state court to collect alimony or child support owed by a federal employee, the government may be liable for reimbursement if it is later held that the state court lacked personal jurisdiction over the employee.

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ALLAN WAYNE MORTON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-60a) is reported at 708 F.2d 680. The opinion of the Claims Court (App., *infra*, 62a-65a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 1983. A timely petition for rehearing was denied on July 5, 1983 (App., *infra*, 61a). On September 26, 1983, the Chief Justice extended the

time for filing a petition for a writ of certiorari to and including December 2, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of the Social Security Act, 42 U.S.C. (Supp. V) 659 *et seq.*, and the pertinent parts of the implementing regulations, 5 C.F.R. Pt. 581, as amended by 48 Fed. Reg. 26279-26294 (1983), are set forth in Appendix D, *infra*, 98a-103a.

STATEMENT

1. In 1974, Congress enacted 42 U.S.C. 659 (amended 1977),¹ which partially waived the traditional sovereign immunity against writs garnishing the salaries of federal employees.² Section 659 (now codified as 42 U.S.C. (Supp. V) 659(a)) allowed garnishment of federal salaries to collect alimony and child support payments "in like manner and to the same extent as if the United States * * * were a private person." However, under 42 U.S.C. (Supp. V) 659(f), which was added in 1977,³ neither the government nor its disbursing officers are liable for amounts paid "pursuant to legal process regular on its face, if such payment is made in accordance with this section and the regulations issued to carry out this section." The term "legal process" is defined by

¹ Section 659 was originally enacted as part of the Social Services Amendments of 1974, Pub. L. No. 93-647, § 101(a), 88 Stat. 2357.

² See *FHA v. Burr*, 309 U.S. 242, 244 (1940); *Buchanan v. Alexander*, 45 U.S. (4 How.) 19, 20 (1846).

³ Tax Reduction and Simplification Act of 1977, Pub. L. No. 95-30, Title V, § 501(a), 91 Stat. 157.

statute as "any writ * * * or other similar process in the nature of garnishment" that, among other things, "is issued by * * * a court of competent jurisdiction" (42 U.S.C. (Supp. V) 662(e) (1)).

2. Respondent, a career Air Force officer, was sued for divorce in Alabama. Served by mail while stationed in Alaska, he failed to make an appearance in the Alabama suit on the advice of counsel⁴ that such service was insufficient. The Alabama court then entered a default judgment granting the divorce and ordering the payment of alimony and child support. To enforce that judgment, the court subsequently issued a writ of garnishment for respondent's federal pay. The Air Force Finance Office at Elmendorf Air Base in Alaska notified respondent that the writ had been received (see 42 U.S.C. (Supp. V) 659 (d)), and respondent, repeating the advice of counsel, protested that his pay could not be garnished because he had not been served properly in the underlying state court proceeding. However, because the Alabama writ was "regular on its face," the Air Force honored the writ and began garnishing respondent's pay (App., *infra*, 4a, 67a). Several months later, respondent successfully sued in the former Court of Claims for recovery of this money, arguing that the Alabama court had lacked in personam jurisdiction (see *id.* at 68a-81a).

On appeal, a divided panel of the Federal Circuit affirmed (App., *infra*, 1a-60a). The court of appeals noted that the government is immune from suit under Section 659(f) only if payment is made "pursuant to legal process regular on its face" (*id.* at 5a-7a). Observing that "legal process" is defined by 42 U.S.C.

⁴ Respondent was advised by an officer of the Air Force Judge Advocate General's office (App., *infra*, 3a-4a).

662(e)(1) as process "issued by * * * a court of competent jurisdiction," the court concluded (*id.* at 3a-11a) that "competent jurisdiction" means both subject matter and in personam jurisdiction. The court then determined that respondent's contacts with Alabama were insufficient to permit the courts of that state to exercise in personam jurisdiction over him (see *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945)), and accordingly held that the Alabama court was not "a court of competent jurisdiction" and that its garnishment writ was therefore not "legal process" within the meaning of 42 U.S.C. (Supp. V) 659 and 662(e)(1) (App. *infra*, 11a-18a).^{*} The court stated (*id.* at 17a (footnotes omitted)):

[W]e hold that the immunity provisions of the garnishment statute permit the Government, where the process document is regular on its face, to make payment without liability on a presumption that the underlying judgment is valid, but that such a presumption is rebuttable by a showing that the Government had notice of a substantial claim of jurisdictional irregularity.

The court found that the government had such notice here and was consequently liable to respondent for the amount withheld from his salary pursuant to the writ (*id.* at 17a-18a).

Judge Nies dissented (App., *infra*, 20a-55a). She concluded that a private employer would not be liable to respondent under the circumstances of this case

^{*} The court of appeals also suggested (App., *infra*, 8a) that alimony or child support orders entered by a court without personal jurisdiction over the defendant are not "legal obligations" under Section 659(a), which waives sovereign immunity for garnishment writs "for the enforcement, against such individual of his *legal obligations* to provide child support or make alimony payments" (emphasis added).

(*id.* at 21a-31a) and that the government was, in any event, immune from respondent's suit under Section 659(f) because the writ of garnishment was "regular on its face" (App., *infra*, 33a-36a). Judge Nies observed (*id.* at 47a):

The majority decision will create chaos in how the Government must operate in the thousands of garnishments it faces daily. It must either pay twice, or where permitted by a state court, litigate for any employee who raises a "substantial claim of jurisdictional irregularity" regardless of the regularity of the process "on its face."

Judge Nies added (*id.* at 42a) that "it would entirely defeat the objective of the garnishment statute * * * if the Government must attempt to defeat the claims of dependent children and spouses, who are the only persons who can garnish federal wages."

REASONS FOR GRANTING THE PETITION

This case presents a question of considerable practical importance concerning the government's obligations when served with a facially valid writ of garnishment. The decision of the court of appeals holding that the government may be held liable in damages for honoring such a writ is contrary to the express language of the federal garnishment statute and its implementing regulations and conflicts with decisions of several other courts of appeals. It places an unmanageable burden on the federal government; in many instances, it will leave federal disbursing officers little choice but to dishonor state court process and stand in contempt; and it will draw the government into marital disputes and cause the government to oppose the alimony and child support claims of former spouses and children, who will otherwise be compelled to depend on public assistance. Review by

this Court is clearly warranted, especially since all suits seeking reimbursement for garnished federal pay may be brought in the Claims Court (28 U.S.C. (Supp. V) 1491).

1. When Congress waived sovereign immunity for certain writs of garnishment (see 42 U.S.C. (Supp. V) 659(a)), it unequivocally provided in 42 U.S.C. (Supp. V) 659(f) that neither the government nor its disbursing officers may be held liable for a payment made "pursuant to legal process regular on its face, if such payment is made in accordance with this section and the regulations issued to carry out this section." In the present case, the court of appeals did not dispute that the garnishment writ was "regular on its face," but the court held that the writ was not "legal process" within the meaning of the garnishment statute. Noting that 42 U.S.C. (Supp. V) 662 (e) (1) defines "legal process" to require issuance by a "court of competent jurisdiction" the court below held that a "court of competent jurisdiction" must have personal, as well as subject matter, jurisdiction and that garnishment writs issued by a court lacking personal jurisdiction are thus not "legal process." Therefore, the court below concluded, when the government honors such a writ despite notice of "a claim of substantial jurisdictional irregularity," the government is not protected from liability by Section 659(f).

The court of appeals' interpretation of the statute is clearly wrong and yields an absurd result. Section 659(f) provides that the government is immune from liability for honoring "legal process regular on its face." If the term "legal process" is limited to process issued by a court with personal, as well as subject matter, jurisdiction, the government is not immune from suit for complying with process that is

"regular on its face," as the plain language of Section 659(f) provides. Instead, the government must look beyond the facial validity of garnishment writs and determine whether the state court that issued the underlying judgment had personal jurisdiction over the defendant. Thus, the court of appeals' construction renders Section 659(f) internally inconsistent.

Apparently recognizing this problem, the court of appeals announced (App., *infra*, 17a (footnotes omitted)) that "the immunity provisions of the garnishment statute permit the Government, where the process document is regular on its face, to make payment without liability on a presumption that the underlying judgment is valid, but that such a presumption is rebuttable by a showing that the Government had notice of a substantial claim of jurisdictional irregularity." Whatever the merit of this rule—and we will show that it is unworkable (see pages 18-21, *infra*)—it is clearly the court's own invention. The court did not purport to extract it from any provision of the federal garnishment statute, from the legislative history of the statute, or indeed from any other authority.

Moreover, this rule cannot be reconciled either with the plain meaning of Section 659(f) or with the court of appeals' own interpretation of the term "legal process." Section 659(f) unambiguously shields the government from liability whenever it honors a state garnishment writ that is "regular on its face"; whether the government had notice of claims regarding the state court's in personam jurisdiction is immaterial. Notice seems equally immaterial if the court of appeals' interpretation of the phrase "court of competent jurisdiction" is accepted. If a court without personal jurisdiction is not a "court of competent jurisdiction," as the decision below held (App.,

infra, 8a-11a), then a garnishment writ issued by such a court is not "legal process" within the meaning of the immunity provision, and that provision does not apply. Whether or not the government had notice of the jurisdictional defect would not seem to matter.

The court of appeals went wrong when it construed the phrase "court of competent jurisdiction" to mean personal, as well as subject matter, jurisdiction. "Competent jurisdiction" usually means merely subject matter jurisdiction. See, *e.g.*, 1 Restatement (Second) of Judgments 27-28 (1982) ("The term 'subject matter jurisdiction' * * * is also sometimes referred to as 'competence' or 'competency.'"); Restatement (Second) of Conflict of Laws § 92 (1971); Restatement of Judgments § 7 (1942); 2 J. Beale, *The Conflict of Laws* § 432.3 at 1377 (1935) (The competence of a court means "jurisdiction to take up the matter under consideration."); 18 U.S.C. 2510(9) ("judge of competent jurisdiction" means judge with authority to enter a certain type of orders).

This interpretation is also supported by the principle that a statute should be construed, where possible, so as to make its provisions consistent. See, *e.g.*, *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975); *Chemehuevi Tribe of Indians v. FPC*, 420 U.S. 395, 403 (1975); *Clark v. Uebersee Finanz-Korporation, A.G.*, 332 U.S. 480, 488-489 (1947). Here, interpreting the phrase "court of competent jurisdiction" to refer only to subject matter jurisdiction harmonizes Section 659(f)'s reference to "legal process regular on its face" with Section 662(e)(1)'s definition of "legal process," which requires issuance by "a court of competent jurisdiction." Unlike the lack of personal

jurisdiction, the absence of subject matter jurisdiction is almost always detectable from the face of the process.⁶

Moreover, as the dissent below pointed out (App., *infra*, 21a-31a), the court of appeals' interpretation subjects the federal government to greater liability and administrative burdens than are borne by private garnishees under the laws of many states—a result that Congress almost certainly did not intend. A number of state statutes insulate garnishees from liability under circumstances such as those present in this case. Alabama law, for example, provides that “[t]he judgment condemning the debt, money or effects to the satisfaction of the plaintiff’s demand is conclusive as between the garnishee and the defendant to the extent of such judgment, unless the defendant prosecutes to effect an appeal from such judgment * * *” (Ala. Code § 6-6-461 (1977)). Cal. Civ. Proc. Code § 706.154(b) (West cum. supp. 1983) provides that “an employer who complies with any written order or written notice which purports to be given or served in accordance with the provisions of this chapter [on garnishment] is not sub-

⁶ There is no merit in the court of appeals' suggestion (App., *infra*, 8a; see also page 4 note 5, *supra*) that alimony or child support orders entered by a court without personal jurisdiction over the defendant do not fall within Section 659(a), which waives sovereign immunity for garnishment writs for the enforcement of “legal obligations” to furnish child support or pay alimony. As the implementing regulations provide (5 C.F.R. 581.102(g)), a “legal obligation” in this context is one that is “enforceable under appropriate State or local law.” Here, the Alabama court enforced respondent’s obligations by issuing the writ. Furthermore, the court of appeals’ interpretation of the phrase “legal obligation” would seemingly exclude judgments suffering any legal defect.

ject to any civil or criminal liability for such compliance unless the employer has actively participated in a fraud." Similarly, N.Y. Civ. Prac. Law § 5209 (McKinney 1978) states:

A person who, pursuant to an execution or order, pays or delivers, to the judgment creditor or a sheriff or receiver, money or other personal property in which a judgment debtor has or will have an interest, or so pays a debt he owes the judgment debtor, is discharged from his obligation to the judgment debtor to the extent of the payment or delivery.

See also Ariz. Rev. Stat. Ann. § 12-1592 (1982); Ark. Stat. Ann. § 31-146 (repl. 1962); Ill. Ann. Stat. ch. 62, § 44 (Smith-Hurd 1972); Ind. Code Ann. § 34-1-11-29 (Burns 1973); Iowa Code Ann. § 642.18 (West 1950); Md. Cts. & Jud. Proc. Code Ann. § 11-601(a) (repl. 1980); Mass. Ann. Laws, ch. 246, § 43 (Michie/Law Coop. 1974); Mo. Ann. Stat. § 525.070 (Vernon 1953); N.H. Rev. Stat. Ann. § 512.28 (repl. 1968); N.J. Stat. Ann. § 2A: 17-53 (West 1952); N.D. Cent. Code § 32-09.1-15 (repl. supp. 1983); Ohio Rev. Code Ann. § 2716.21(D) (Page supp. 1982); Okla. Stat. Ann. tit. 12, § 1233 (West 1961); Tenn. Code Ann. § 29-7-117 (repl. 1980); Wash. Rev. Code Ann. § 7.32.300 (1961).

It seems quite unlikely that Congress intended to treat the government more harshly than private garnishees. Not only has the federal government traditionally been immune altogether from garnishment writs, but the administrative burden on the government, by far the nation's largest employer, would far exceed that of any private garnishee.⁷

⁷ We acknowledge that there is authority for the proposition that "a valid judgment against the defendant is essential

2. The court of appeals also gave insufficient deference to the interpretations of those charged with administration of the federal garnishment statute. See, e.g., *United States v. Clark*, 454 U.S. 555, 565 (1982); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-381 (1969); *Udall v. Tallman*, 380 U.S. 1, 16 (1965). The Comptroller General has held that a military employee whose salary is garnished pursuant to a facially valid writ is not entitled to reimbursement even if the underlying judgment is set aside for lack of personal jurisdiction.⁸ And the implementing regulations issued by the Office of Personnel Management (see 5 C.F.R. Pt. 581), as amended by 48 Fed. Reg. 26279-26294 (1983)) provide that the federal government must comply with a garnishment writ except in certain enumerated circumstances, such as where there are jurisdictional defects apparent "on its face" or where the garnishment is not for alimony or child support (5 C.F.R. 581.305,

to the validity of a judgment against the garnishee" (App., *infra*, 11a n.5). See Annot., 49 A.L.R. 1411 (1927); 6 Am. Jur. 2d *Attachment and Garnishment* § 400 (1963) and cases cited; 38 C.J.S. *Garnishment* §§ 244 and 293(e) (1943) and cases cited. Many of these cases, however, appear to have been overruled by statutory enactments, and most concern pre-judgment garnishment, where the garnishee had the duty to assert certain defenses that would be available to the defendant, including jurisdictional defects (see *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 344 (1969) (Black, J., dissenting)). This obligation was important in pre-judgment garnishment because it was not always necessary for the plaintiff to give the defendant notice of the garnishment (see *Sniadach*, *supra* (declaring procedure unconstitutional)).

⁸ *In re Technical Sergeant Harry E. Mathews, USAF*, File No. B-203668 (Comp. Gen. Dec. Feb. 2. 1982) (App., *infra*, 109a-112a).

as amended by 48 Fed. Reg. 26280-26281 (1983)). Doubts about in personam jurisdiction over the defendant/employee in the underlying divorce proceedings are not mentioned as a ground for nonpayment.⁹

3. The court of appeals' decision conflicts with *Calhoun v. United States*, 557 F.2d 401 (4th Cir.), cert. denied, 434 U.S. 966 (1977), which affirmed summary judgment against a Navy officer who sought recovery of pay garnished to satisfy alimony and child support obligations. The officer contended that the garnishment writ was void because the court that issued the underlying divorce judgment lacked personal jurisdiction over him (557 F.2d at 402). Rejecting that argument, the Fourth Circuit observed (*ibid.*) that the divorce judgment was "facially valid" and added:

Calhoun is assuredly in a better position to effectively litigate [the issue of personal jurisdiction] than is the United States. The United States was under no duty to contest the judgment, exposing itself to potential double liabilities. It was Calhoun's obligation to attack the judgment if he wished to avoid the deduction from his pay.^[10]

⁹ See also 5 C.F.R. 581.305(a)(6)(f), as added by 48 Fed. Reg. 26280 (1983) (App., *infra*, 102a-103a).

¹⁰ The court below attempted to distinguish *Calhoun* on two grounds. First, the court observed (App., *infra*, 10a) that *Calhoun* did not consider the effect of 42 U.S.C. (Supp. V) 659(f), which took effect shortly before the decision in that case. Section 659(f), however, immunizes the government from liability for honoring certain writs. We fail to see how Section 659(f) can possibly be interpreted as expanding the government's liability. Thus, Section 659(f) could not have changed the result in *Calhoun*.

This conclusion is supported by the Senate report on the 1977 amendments to the garnishment statute, which stated

Similarly, the Eighth Circuit held in *Overman v. United States*, 563 F.2d 1287 (1977), that Section 659 did not permit a suit by a federal employee to enjoin the government from honoring a garnishment writ allegedly procured by fraud. The court concluded (*id.* at 1291) that no statute waived sovereign immunity from such a suit and reasoned that 42 U.S.C. 659 (now codified as amended at 42 U.S.C. (Supp. V) 659(a)) did not provide the requisite waiver but "simply removed the bar of sovereign immunity to one narrow class of actions: enforcement of garnishment writs issued by state courts."¹¹

The decision below also conflicts with the District of Columbia Circuit's recent decision in *Rush v.*

(S. Rep. 1350, 94th Cong., 2d Sess. 3 (1976)) that "[i]t is not the purpose of the committee bill to make any major changes in the new child support law. The bill would make modifications, consistent with the original congressional intent, to clarify questions that have been raised [and] to provide for administrative improvement."

The court below also argued (App., *infra*, 17a-18a) that here, "unlike the situation in the *Calhoun* case, the State of Alabama had no 'long-arm' statute at the time of filing of the suit by Mrs. Morton." But as the dissenting judge pointed out (App., *infra*, 30a-31a), "[t]he *Calhoun* court did not exonerate the United States because the underlying judgment was not void, but because in its view, it is not incumbent on an employer to look behind the *facial* validity of the garnishment process." See also *id.* at 30a n.7.

¹¹ Like *Calhoun*, *Overman* did not discuss Section 659(f). As previously noted, however, Section 659(f) does not expand the government's liability. The court below attempted to distinguish *Overman* because there the underlying judgment was alleged to be defective on the grounds of fraud and not for lack of personal jurisdiction (App., *infra*, 10a-11a). However, since the decision in *Overman* was based on sovereign immunity, this distinction does not seem relevant to *Overman's* analysis.

United States Agency for International Development, No. 82-1853 (Apr. 26, 1983) (App., *infra*, 104a-107a).¹² There, a federal employee sued for recovery of garnished wages and injunctive relief, claiming among other things that the state court that ordered him to pay child support lacked personal jurisdiction. Noting that the government is immune from suit for payments made pursuant to a garnishment writ that is "regular on its face" (42 U.S.C. (Supp. V) 659 (f)), the District of Columbia Circuit remarked (App., *infra*, 107a):

In the present case, Rush has not claimed that the garnishment order was facially invalid or that AID violated statutory requirements or applicable regulations. Thus, at least to the extent that Rush seeks reimbursement of funds previously garnished, he is barred by the statute from litigating those claims against AID or its administrator.

The court did not inquire whether the government had notice of any substantial jurisdictional irregularities, as the Federal Circuit's decision requires. See also *Snapp v. United States Postal Service—Texarkana*, 664 F.2d 1329 (5th Cir. 1982) (no subject matter jurisdiction of employee's suit to enjoin garnishment); *Jizmerjian v. Department of the Air Force*, 457 F. Supp. 820 (D.S.C. 1978), *aff'd*, 607 F.2d 1001

¹² Rush's petition for a writ of certiorari (No. 83-382) is pending. As explained in our brief in opposition in that case (a copy of which we are serving on petitioner), we believe that certiorari should be denied in that case. While we are confident that the *Rush* court would decide the present case differently from the Federal Circuit, we think that the Federal Circuit would reach the same result in *Rush* as did the District of Columbia Circuit.

(4th Cir. 1979), cert. denied, 444 U.S. 1082 (1980); *Cunningham v. Department of the Navy*, 455 F. Supp. 1370 (D. Conn. 1978); *Popple v. United States*, 416 F. Supp. 1227 (W.D.N.Y. 1976).

4.a. The court of appeals' interpretation of the garnishment statute will frustrate Congress's expressed intent. The garnishment statute, together with other related measures, was enacted "to assure an effective program of child support." S. Rep. 1356, 93d Cong., 2d Sess. 2 (1974). The Senate report stated (*id.* at 42) that "[t]he problem of welfare in the United States is, to a considerable extent, a problem of the nonsupport of children by their absent parents * * *. The Committee believes that all children have the right to receive support from their fathers. * * * [E]nforcement of child support obligation is not an area of jurisprudence of which this country can be proud."

Before the federal garnishment statute was enacted, there were two chief ways to enforce a child support or alimony award against a federal employee or serviceman (hereinafter "husband") living in another state. First, the non-employee spouse ("wife") could seek to enforce the award in the courts of the husband's state. This procedure was unsatisfactory for several reasons. It was costly for the wife to litigate in a distant state. The husband often had no assets to attach other than his federal salary, which could not be garnished. A delinquent husband, who might have moved in the first place to escape payment, could simply move again. And because states are constitutionally required to extend full faith and credit to support orders only if they are final under the law of the issuing state (*Sistare v. Sistare*, 218 U.S. 1 (1910)), it was often necessary for the wife

to bring repeated enforcement actions as installments became due.¹³

Because of these and other problems, the Uniform Reciprocal Enforcement of Support Act (URESA) (9 U.L.A. 643 (1979)) was promulgated in 1950. URESA or compatible legislation has now been adopted by every state.¹⁴ Under URESA, the wife or children may file a complaint in their state of residence (§§ 13, 14). If the court finds that the complaint "sets forth facts from which it may be determined that the [husband] owes a duty of support," the court sends the complaint to the appropriate court in the husband's state (§ 17), where the local prosecutor represents the wife (§ 18) and seeks the issuance of a support order (§ 23).

This procedure also proved ineffective. The Senate committee that added the garnishment statute observed (S. Rep. 1356, 93d Cong., 2d Sess. 43 (1974)): "Thousands of unserved child support warrants pile up in many jurisdictions and often traffic cases have a higher priority." The committee noted (*id.* at 43-44) that the former wives and children of many affluent or middle-class fathers were forced to live on public assistance because of the lack of effective procedures for enforcing support awards, and

¹³ See Note, *Counterclaims and Defenses under the Uniform Reciprocal Enforcement of Support Act*, 15 Ga. L. Rev. 143, 144 (1980) (hereinafter cited as Note, *Counterclaims and Defenses*); Note, *Interstate Enforcement of Support Obligations through Long Arm Statutes and URESA*, 18 J. Family Law 537 (1979-1980).

¹⁴ See Note, *Counterclaims and Defenses*, *supra*, at 145 n.11 (collecting statutes). New York, which has not adopted URESA, has a similar, compatible law (N.Y. Dom. Rel. Law §§ 30-43 (McKinney 1977)).

the committee listed as among the principal flaws in procedures then available "the statutory barrier to collecting from military personnel and Federal employees, and the low priority given child support investigations by the understaffed district attorneys offices" (*id.* at 44; see also 120 Cong. Rec. 40323-40324 (1974)). During the House debates on the garnishment statute, Representative Ullman, the floor sponsor, made much the same point, stating (120 Cong. Rec. 41810 (1974)): "[O]ur biggest problem in this whole area is that prosecutors fail to prosecute [under URESA] because they have more important things to do. We just simply have not even gotten a start on presenting these cases."

Congress also recognized the special problems posed by delinquent husbands who were federal or military retirees. A House report on a predecessor garnishment bill noted (H.R. Rep. 481, 92d Cong., 1st Sess. 17 (1971)) that suits to enforce retirees' support obligations were "frequently thwarted by a retiree pulling up stakes in the state in which he is being sued and moving to another state where legal action must be commenced again." Recommending the waiver of sovereign immunity for certain garnishment writs, the committee stated (*id.* at 18):

We recognize this is a drastic departure from anything we have had in the past; but we believe it is wrong for the United States to protect retired and retainer pay while the military retiree can, for practical purposes, ignore court orders.

* * * * *

We recognize that the military retiree, because of the frequency of moves during the time spent on active duty, may have less roots in a particular community than his civilian counterpart.

b. The federal garnishment statute was designed to remedy many of these problems. It permits the garnishment of federal pay to enforce alimony and child support obligations "in like manner and to the same extent as if the United States or the District of Columbia were a private person" (42 U.S.C. (Supp. V) 659(a)). This enables wives to attach an asset that cannot easily be concealed, and it prevents husbands from evading payment by changing their residences. The government is not drawn into marital disputes and is spared undue administrative expense, because it is immune from liability for honoring "legal process regular on its face, if such payment is made in accordance with [the garnishment statute] and the regulations issued to carry out [that statute]" (42 U.S.C. (Supp. V) 659(f)). At the same time, the husband's rights are protected because he is promptly notified when the writ is served (42 U.S.C. (Supp. V) 659(d)) and may then take whatever steps are available to any other similarly situated garnishment defendant under the laws of the issuing state. See 120 Cong. Rec. 41810 (1974) (remarks of Rep. Ullman).

The court of appeals' decision thwarts this carefully crafted scheme and frustrates Congress's clear intent concerning the enforcement of the alimony and child support obligations of federal and military employees and retirees. It also creates an unmanageable burden for federal disbursing officers by forcing them to choose between ignoring state court orders or subjecting the government to monetary liability.

Under the decision below, the government may be liable for reimbursement if it honors a facially valid garnishment writ after having received "notice of a substantial claim of jurisdiction irregularity"

(App., *infra*, 17a). Indeed, the court reserved decision on the question whether notice of a mere "non-frivolous claim" would not also suffice (*id.* at 17a, n.12). We have been informed that the salaries of more than 13,000 servicemen alone are now being garnished.

It is predictable that, as a result of the court of appeals' decision, a large number of the federal employees whose salaries are garnished will seek to avoid payment by providing disbursing officers with notice of claimed jurisdictional defects. Especially in cases involving servicemen, who are frequently transferred, asserting a colorable claim of lack of in personam jurisdiction will not be difficult. As Judge Nies noted in dissent (App., *infra*, 42a-43a), "[t]he majority's test of 'notice of substantial irregularity' means no more, on the basis of the facts here, than that an employee must tell his pay officer or supervisor that he was not domiciled in the state asserting jurisdiction over him."

Determining whether such claims are "substantial" or "nonfrivolous" is a task beyond the capabilities of federal disbursing offices. In the first place, there is no satisfactory way for disbursing officers to ascertain the relevant facts. If they rely on employees' allegations, employees will have little trouble establishing "substantial" claims. On the other hand, it is completely unreasonable to expect disbursing officers to engage in independent factfinding based on the state court record or the parties' submissions.

Even if the facts are undisputed, evaluating jurisdictional claims would be extremely time-consuming and would require considerable legal skill. Questions of in personam jurisdiction are often difficult, and cases involving servicemen are likely to explore the

outer reaches of the states' power in this regard. Moreover, the court of appeals' decision holds the government to an extremely high standard. The government may not safely rely upon a state court's determination that personal jurisdiction was present. Instead, the government must decide whether the state court erred, or at least whether a substantial or nonfrivolous claim of error has been asserted.

If the government honors a garnishment writ despite a claim of jurisdictional irregularity, it will risk having to pay twice in the event that the Claims Court decides the issue of in personam jurisdiction differently. Because of this risk, as well as the difficulty and uncertainty involved in determining whether a substantial claim of jurisdictional irregularity has been raised, federal disbursing officers in many cases will have little choice but to disobey state garnishment writs. This will lead to needless friction between the federal government and state courts (see App., *infra*, 25a, 47a-52a (Nies, J., dissenting)),¹⁵

¹⁵ The government's authority to refuse to comply with state garnishment writs is uncertain. Section 659(a) provides that the government is to be treated "in like manner and to the same extent as if the United States * * * were a private person." Post-judgment garnishment procedures frequently do not permit the defendant, let alone the garnishee, to attack the underlying judgment. Instead, the garnishee is merely called upon to answer whether he owes the defendant any money and, if so, the amount of indebtedness. See, e.g., Ill. Ann. Stat. ch. 62, § 39(b) (Smith-Hurd 1972); Ohio Rev. Code Ann. § 2716.13(B); 2721.01(C) (Page supp. 1982). Under the Alabama statutes, the garnishee must answer whether he is or will be indebted to the defendant (Ala. Code §§ 6-6-393, 6-6-450 (1977)). "If the garnishee answers and admits indebtedness to the defendant, judgment thereon must be entered against him, after judgment against the defendant * * *" (*id.* at § 6-6-454). Thus, as Judge Nies ob-

and will force wives and children to whom alimony and child support payments are owed to rely upon the remedies that Congress found to be inadequate when it enacted the garnishment statute. See App., *infra*, 19a n.14.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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served (App., *infra*, 25a), "[t]he United States could no more 'refuse to honor' the writ summoning the Government to the Alabama court than it could 'refuse to honor' the summons by the Court of Claims."

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appeal No. 290-77

ALLAN WAYNE MORTON, APPELLEE

v.

THE UNITED STATES, APPELLANT

Decided: May 17, 1983

Before MILLER, SMITH, and NIES, *Circuit Judges*.

MILLER, *Circuit Judge*.

This appeal, in a case of first impression, is from a judgment¹ of the United States Claims Court based on its holding that Allan Wayne Morton was entitled to recover from the United States accrued amounts of money withheld from his compensation, as a Colonel in the United States Air Force, pursuant to writs of garnishment issued by the Circuit Court for the Tenth Judicial Circuit of Alabama. The case arises under Title 37, United States Code (relating to pay and allowances of the uniformed services), and the Fifth Amendment to the Constitution (prohibiting deprivation of property without due process of law). We affirm.

¹ Entered October 8, 1982, pursuant to this court's order of October 4, 1982, and corresponding to the decision recommended by the trial judge in his opinion filed December 14, 1981.

BACKGROUND

Colonel Morton was born in Alabama in 1934 and lived there until he joined the Air Force in 1957 at the age of 23. In 1954, he married Patricia Kay Morton in Alabama, where their first son was born. The Mortons moved to Georgia in 1957; then to Ohio in 1960; to Georgia in 1961; to the Philippines in 1963; and to New York in 1965. A second son was born in 1960. Colonel Morton served in Vietnam from 1968 to 1969, during which time his family lived in Florida. In 1969, after returning from Vietnam, Colonel Morton and his wife bought a home in Virginia, where they lived until September of 1973, at which time they separated pursuant to a written separation agreement. (Colonel Morton had been notified in August of 1973 that his next military assignment would be in Alaska.)

Mrs. Morton and her two sons moved to Alabama on September 16, 1973. Household goods were moved to Alabama at that time using Colonel Morton's military household goods moving allowance. It was Colonel Morton's understanding that in order to use his moving allowance for this purpose it was necessary to file his income tax returns for 1973 in Alabama. Accordingly, Colonel and Mrs. Morton filed joint federal and state income tax returns in Alabama for 1973. They also filed a joint state income tax return in Virginia for 1973. For 1974, Mrs. Morton filed individual federal and Alabama income tax returns, refusing to file joint returns with Colonel Morton, who also filed separate returns in Alabama because he hoped to persuade Mrs. Morton to file joint returns with him in order to reduce their tax liability. (Such joint returns would, of course, supersede the previously filed individual returns.) Colonel Morton also filed a 1974 individual state income tax return in Virginia. His income tax returns for 1975 and thereafter were filed in Alaska.

The separation agreement provided, *inter alia*, that the Virginia home was to be the sole property of Colonel

Morton and that he was to make fixed monthly payments to Mrs. Morton for the support of the two children.

On June 1, 1974, Colonel Morton entered into a contract to purchase a permanent home for himself in Anchorage, Alaska. He intended to finance the purchase in part from the proceeds of the sale of the Virginia home. However, he was unable to consummate the Alaska purchase because, contrary to the provisions of the separation agreement, Mrs. Morton refused to sign the deed conveying the Virginia home. In a suit by Colonel Morton to obtain specific performance of the separation agreement, Mrs. Morton succeeded in having the agreement set aside.

Meanwhile, on August 28, 1974, Mrs. Morton filed suit in the Circuit Court for the Tenth Judicial District of Alabama for divorce, custody of the two children, support and maintenance for the children, and alimony. Colonel Morton received the suit papers by registered mail on September 17, 1974. Personal service was never effected. Colonel Morton contacted an attorney in the Judge Advocate General's office at Elmendorf Air Force Base in Alaska who advised him that service by mail was not sufficient to support a money judgment against him. Accordingly, Colonel Morton did not make an appearance in the Alabama suit. Judgment by default was entered against Colonel Morton on August 14, 1975. It granted Mrs. Morton a divorce and custody of the two children, and ordered Colonel Morton to pay Mrs. Morton \$500 per month "as alimony . . . and partial support and maintenance of the . . . minor children."

On December 27, 1976, the Air Force Finance Office at Elmendorf received a writ of garnishment issued by the Register of the Alabama court which sought to garnish Colonel Morton's pay in the amount of \$4100. After receiving notice of the writ, Colonel Morton again sought advice from an attorney in the Judge Advocate General's office. The attorney assured Colonel Morton that Mrs. Morton could not legally garnish his pay on the basis of the service of process by mail from the State of Alabama. Thereafter, on December 30, 1976, Colonel Morton pro-

tested to the Finance Office that he had paid all his obligations to Mrs. Morton,² that he was never properly served in the Alabama suit, that he was neither a resident nor a domiciliary of Alabama, and that the decree of the Alabama court ordering him to pay alimony and child support was void for lack of jurisdiction.

Despite these protests, the Finance Office filed an answer to the writ on January 11, 1977, confessing indebtedness of \$4100. That amount was subsequently deducted from Colonel Morton's pay and was paid to the clerk of the Alabama court. Other subsequent writs were similarly honored by the Finance Office.

On May 26, 1977, Colonel Morton filed this action to recover the amounts he alleges were wrongfully withheld from his military pay.

The Decision Below

The trial court concluded that Colonel Morton was neither a resident nor a domiciliary of Alabama, stating:

When the plaintiff moved to Alaska in May 1974, it was his intention to purchase a home in Alaska and to establish a domicile in that State. He made his intention known at the time to associates.

....

A change in domicile requires physical presence at the new location, plus an intention on the part of the individual to make the new location his or her home, and the absence of any intention to have a home at a former domicile. *Stamer v. United States*, 148 Ct. Cl. 482, 490 (1960); cf. *Holmes v. Sopuch*, 639 F.2d 431, 433 (8th Cir. 1981). When these elements concur, the change in domicile is in-

² At trial, Colonel Morton introduced evidence that, although the separation agreement had been set aside, he had continued to make support payments (\$500 per month) to Mrs. Morton because he felt a moral obligation to do so; further, that at the time the writ was served, his oldest son was no longer a minor and was married.

stantaneous. *Spurgeon v. Mission State Bank*, 151 F.2d 702, 705-06 (8th Cir.), cert. denied, 327 U.S. 782 (1945).

With respect to the plaintiff, the essential elements for acquiring a new domicile concurred when the plaintiff arrived in Alaska during the month of May 1974. From then until 1977, the plaintiff was an actual resident of Alaska, it was his intention to make Alaska his home, and he lacked any intention to have a home at a former domicile. Accordingly, it necessarily follows that the plaintiff was a domiciliary of Alaska, and not of Alabama, during the 1974-75 period when the divorce proceeding against him in Alabama was in progress.

Next, considering the "minimum contacts" doctrine of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and its progeny, the trial court concluded that—

it would offend "traditional notions of fair play, and substantial justice" if the plaintiff's contacts with Alabama prior to July 1957 were to be regarded as necessarily conferring jurisdiction on the Alabama courts to enter a money judgment against him some 18 years later, when the plaintiff was a domiciliary and actual resident of Alaska, was not served personally within the territorial limits of Alabama, and did not do anything to subject himself to the jurisdiction of the Alabama court.

The third and final question considered by the trial court was whether subsection (f) of the garnishment statute, 42 U.S.C. § 659, as amended by Pub. L. 95-30, § 501, 91 Stat. 157 (1977),³ grants the Government im-

³ 42 U.S.C. § 659(a) allows the United States to be served with legal process for the enforcement of its employees' legal obligations to provide child support and alimony, thus:

United States and District of Columbia to be subject to legal process

Notwithstanding any other provision of law, effective January 1, 1975, moneys (the entitlement to which is based upon

munity from suit under the circumstances of this case. This subsection provides:

Non-liability of United States, disbursing officers, and governmental entities with respect to payments

Neither the United States, any disbursing officer, nor governmental entity shall be liable with respect to any payment made from moneys due or payable from the United States to any individual pursuant to legal process regular on its face, if such payment is made in accordance with this section and the regulations issued to carry out this section.

“Legal process” is defined in 42 U.S.C. § 662:

Definitions

For purposes of section 659 of this title—

....

(e) The term “legal process” means any writ, order, summons, or other similar process in the nature of garnishment, which—

(1) is issued by (A) a court of competent jurisdiction within any State, territory, or possession of the United States, (B) a court of competent jurisdiction in any foreign country with which the United States has entered into an agreement which requires the United States to honor such process, or (C) an authorized official pursuant to an order of such a court of competent jurisdiction or pursuant to State or local law, and

remuneration for employment) due from, or payable by, the United States or the District of Columbia (including any agency, subdivision, or instrumentality thereof) to an individual, including members of the armed services, shall be subject, in like manner and to the same extent as if the United States or the District of Columbia were a private person, to legal process brought for the enforcement, against such individual of his legal obligations to provide child support or make alimony payments.

(2) is directed to, and the purpose of which is to compel, a governmental entity, which holds moneys which are otherwise payable to an individual, to make a payment from such moneys to another party in order to satisfy a legal obligation of such individual to provide child support or make alimony payments.

The regulations issued to carry out 42 U.S.C. § 659 provide in pertinent part:

(f) "Legal process" means any writ, order, summons, or other similar process in the nature of garnishment, * * * which—

(1) Is issued by:

(i) *A court of competent jurisdiction*, including Indian tribal courts, within any State, territory, or possession of the United States, or the District of Columbia * * *.

5 C.F.R. § 581.102(f) (1981) (emphasis supplied).

Regarding the question of whether the Government had made payment "pursuant to legal process regular on its face" and was, therefore, provided with immunity under 42 U.S.C. § 659(f), the trial judge concluded:

As the decree of the Alabama court was void for lack of jurisdiction insofar as it ordered Colonel Morton to make alimony and child support payments to Patricia Kay Morton, the writs of garnishment must necessarily fall along with the portion of the decree on which they were based. *Laborde v. Ubarri*, 214 U.S. 173, 174 (1909).

....

As the Alabama court, in purporting to order Colonel Morton to make alimony and child support payments to Patricia Kay Morton, was not a "court of competent jurisdiction" because it had not acquired jurisdiction over the person of Colonel Morton, the void ancillary writs of garnishment which the Air

Force Finance Office honored in this case did not constitute the sort of "legal process" that would have insulated the Government against liability.

ANALYSIS

Immunity

As quoted above, 42 U.S.C. § 662 defines "legal process" to require that it be issued by a court of competent jurisdiction. There is no legislative history to guide us in interpreting the phrase "competent jurisdiction," but we may assume that Congress was aware that garnishment, a form of attachment, is merely an incident to a suit, and unless the suit can be maintained the garnishment must fail.⁴ Accordingly, we conclude that process issued by a court in an ancillary garnishment proceeding against the Government does not satisfy the statutory and regulatory requirements if that court was not a court of competent jurisdiction over the underlying suit.

The point can also be made that where the judgment in the underlying suit is void, the "legal obligations" requirement of 42 U.S.C. § 659(a) is not satisfied. Similarly, Regulation 581.102(g) defines "legal obligation" to mean an obligation "which is *enforceable* under appropriate State or local law." (Emphasis added.) Obviously a void judgment would not meet this requirement.

With respect to whether 42 U.S.C. § 659(f) provides the Government with immunity from suit under the facts

⁴ *Big Vein Coal Co. v. Read*, 229 U.S. 31, 38 (1913); *Laborde v. Ubarri*, 214 U.S. 173 (1909); *Davis v. Ensign-Bickford Co.*, 139 F.2d 624, 626 (8th Cir. 1944); see also *In re Stark*, 36 F.2d 280 (W.D.N.Y. 1929); *Olson v. Field Enterprises Educational Corp.*, 231 So. 2d 763, 765 (Ala. App. 1970) ("Garnishment is an ancillary proceeding, not an original civil suit.") What the dissent appears to say is that even if the Alabama court was not a court of competent jurisdiction over the underlying suit (in which event its judgment would be void), it was, nevertheless, a court of competent jurisdiction for purposes of the garnishment. Such a narrow reading of the phrase would elevate form over substance, to the deprivation of property without constitutional due process.

of this case, it must be determined whether "competent jurisdiction" in the statute (42 U.S.C. § 662(e)(1)) and regulations (5 C.F.R. § 581.102(f)) means only subject matter jurisdiction or both subject matter *and* personal jurisdiction; further, whether the immunity statute's provision that legal process be "regular on its face" permits the Government to escape liability notwithstanding notice of substantial questions over regularity. Colonel Morton argues that the Government is immune from suit only if payment is made by the United States "pursuant to legal process" and if that payment is made "in accordance with . . . the regulations issued to carry out [that] section." 42 U.S.C. § 659(f). He contends that, because "a court of competent jurisdiction" is one having both subject matter jurisdiction and personal jurisdiction, citing *Robinson v. Attapulugus Clay Co.*, 55 Ga. App. 141, 189 S.E. 555 (1937), and *State v. Long*, 44 Del. 251, 59 A.2d 545 (1948), *rev'd on other grounds*, 44 Del. 262, 65 A.2d 489 (1949), the Government cannot be immune from suit in this case unless the Alabama court had personal jurisdiction over him in the underlying suit for divorce, support, and alimony.

The Government objects to this interpretation, arguing that to so limit the Government's immunity would place an intolerable burden on the executive branch and would cause an administrative nightmare that Congress could never have intended. The Government further argues that case law uniformly interprets the statute to preclude looking into the validity of the underlying judgment so long as the writ of garnishment is "regular on its face."

However, the cases relied upon by the Government, beginning with *Popple v. United States*, 416 F. Supp. 1227 (W.D. N.Y. 1976), and including *Craft v. Craft*, No. 77-1205 (W.D. Okla. Feb. 16, 1979), involved the question of whether a federal district court had *subject matter* jurisdiction under 42 U.S.C. § 659 to entertain a challenge to a writ of garnishment issued pursuant to that statute. In *Overman v. United States*, 563 F.2d 1287 (8th Cir.

1977), the plaintiff's attempt to challenge garnishment of his salary was based on the allegation that the underlying Tennessee divorce decree had been obtained by fraud—not on lack of personal jurisdiction. In *Cunningham v. Dept. of Navy*, 455 F. Supp. 1370 (D. Conn. 1978), the plaintiff based his challenge to the garnishment of his disability retirement pension on the alleged unconstitutional application of the New York "long-arm" statute. In *Jizmerjian v. Dept. of Air Force*, 457 F. Supp. 820 (D. S.C. 1978), *aff'd mem.*, 607 F.2d 1001 (4th Cir. 1979), *cert. denied*, 444 U.S. 1082 (1980), the court looked to the facial validity of the legal process (garnishment) and did not even mention, much less consider, the requirement in 42 U.S.C. § 662 that such process be issued by a court of competent jurisdiction. In *Calhoun v. United States*, 557 F.2d 401 (4th Cir.), *cert. denied*, 434 U.S. 966 (1977), the decision in the court's brief per curiam opinion, which noted the facial validity of the underlying divorce judgment, was issued June 21, 1977, after the effective date (June 1, 1977) of the amendments added by Pub. L. No. 95-30, 91 Stat. 159 (May 23, 1977), which included the requirement that legal process regular on its face must be issued by a court of competent jurisdiction. Since the case was argued February 16, 1977, it is apparent that the court did not consider the court of competent jurisdiction requirement, as we have.

We conclude that "competent jurisdiction" in the statute and regulations means both subject matter jurisdiction and personal jurisdiction. A court's jurisdiction normally encompasses both personal and subject matter jurisdiction, and we see nothing in the cases cited by the Government or in the legislative history suggesting otherwise when the Government's immunity is invoked. In a recent opinion, *Lugar v. Edmondson Oil Co., Inc.*, — U.S. —, 102 S. Ct. 2744, 2752 (1982), the Supreme Court makes it clear that constitutional requirements of due process have long been applied to garnishment procedures, citing *Sniadach v. Family Finance*

Corp., 395 U.S. 337 (1969), and *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975). Moreover, it has long been the rule that a court cannot adjudicate a personal claim, such as one for alimony or child support, without jurisdiction over the person. *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 418 (1957).⁵ Alabama law cannot, under the label of "comity" or "indifference" override federal constitutional and statutory requirements.

Jurisdiction

The due process clause of the Fourteenth Amendment places a limitation on the circumstances in which a state may assert personal jurisdiction over a nonresident defendant. The seminal case of *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) established what has since become known as the "minimum contacts" test for personal jurisdiction:

[D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

⁵ The dissent finds no authority which imposes liability on a private employer (or other garnishee) for failure to undertake the defense of a supplemental garnishment proceeding by attacking the underlying judgment against the judgment-debtor. However, it appears to be well settled that a valid judgment against the defendant is essential to the validity of a judgment against the garnishee. 38 C.J.S. § 244 and cases cited. Also, recovery for wrongful garnishment has been allowed in suits brought by the defendants. 38 C.J.S. § 311 and cases cited. We note, particularly, the case of *Betts v. Coltes*, 467 F. Supp. 544 (D. Hawaii 1979), where the court made clear that monies erroneously paid over to a judgment creditor may be recovered, and a misuse of process or a failure to correct an erroneous garnishment could entitle an employee to damages from his employer.

The type of contacts necessary to satisfy the due process clause was explained by the Supreme Court in *Hanson v. Denckla*, 357 U.S. 235, 253 (1958):

The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.

Accordingly, the mere fact that Mrs. Morton and the two Morton children moved from Virginia to Alabama following the Mortons' separation in Virginia was insufficient to invest Alabama courts with personal jurisdiction over Colonel Morton in the underlying suit. Indeed, this very question was treated by the Supreme Court in *Kulko v. California Superior Court*, 436 U.S. 84 (1978).

In that case, Mr. and Mrs. Kulko were married in California during a three-day stopover while Mr. Kulko was en route from Texas to a military tour of duty in Korea. Subsequently, the Kulkos moved to New York, where they lived until 1972. During that time, two children were born to them. In 1972, the Kulkos separated pursuant to an agreement drawn up in New York which, *inter alia*, provided for specified joint custody. Mrs. Kulko subsequently secured a Haitian divorce decree which incorporated the terms of the separation agreement, including a provision for child support payments while the children were with their mother. She thereafter moved to California, where she was joined by the two children, who had been living with their father. When she brought an action in California to establish the Haitian decree as a California judgment, to obtain full custody of the

children, and to increase Mr. Kulko's support obligations, Mr. Kulko entered a special appearance to contest jurisdiction on constitutional grounds. The Supreme Court held that Mr. Kulko's contacts with California were insufficient, as a matter of Fourteenth Amendment due process, to vest the courts of that state with personal jurisdiction over him.⁶

In determining whether, under the particular facts of the instant case, the "quality and nature" of Colonel Morton's contacts with Alabama enabled the Alabama state court to have personal jurisdiction over him,⁷ domicile must be considered. It is well settled that in order to acquire a new domicile, a person must be present in the new location, intended to make that location his home, and have no intent to have a home at a former domicile. *Stamer v. United States*, 148 Ct. Cl. 482, 490 (1960). The Government contends that Colonel Morton's acts do not bear out the trial judge's findings that he had an intent to make a permanent home in Alaska and no intent to return to a former domicile. In particular, the Government points to the fact that Colonel Morton filed

⁶ The Court said that "the mere act of sending a child to California to live with her mother . . . connotes no intention to obtain or expectancy of receiving a corresponding benefit in the State that would make fair the assertion of that State's judicial jurisdiction." 436 U.S. at 101. In like manner, Colonel Morton's contacts with Alabama from 1957 to 1973 were unrelated to state benefits. We are satisfied that he never resumed, or intended to resume, residence or domicile in Alabama and that he did intend to and did acquire such status in Alaska.

⁷ We note that the due process clause of the Fourteenth Amendment does not serve as an independent basis for personal jurisdiction. Rather, "[t]he Due Process Clause of the Fourteenth Amendment operates as a limitation on the jurisdiction of state courts to enter judgments affecting rights or interests of nonresident defendants," *Kulko v. California Superior Court*, 436 U.S. at 91, serving as a "constitutional limitation on state power." *Shaffer v. Heitner*, 433 U.S. 186, 216-17 (1977). See also *Home Ins. Co. v. Dick*, 281 U.S. 397, 410 (1930).

income tax returns in Alabama in 1973 and 1974. However, the trial judge found that the reasons for filing in Alabama were connected with the Mortons' separation and the presence of Mrs. Morton in Alabama, and that such filing did not reflect Colonel Morton's intent to return to Alabama, to derive any benefit or protection from the laws of that state, or to not make Alaska his home. We are satisfied that the trial judge's findings are sufficiently supported by the record.⁸ Thus, we conclude that Colonel Morton was domiciled in Alaska on August 28, 1974.⁹

Next, we regard as *de minimis* Colonel Morton's having once lived in Alabama more than 17 years before institution of the divorce suit. This conclusion is well supported by *Lightell v. Lightell*, 394 So.2d 41 (Ala. Civ. App. 1981), in which the court held that the lower court (Circuit Court, Montgomery County—Fifteenth Judicial Circuit) did not have in personam jurisdiction over the husband required to render a determination of paternity and a personal judgment for child support, alimony, attorney fees, and division of out-of-state property. The parties had separated while living in North Carolina. Thereafter, the wife moved to Alabama, and the husband traveled about pursuant to his career and currently resided in the Canal Zone. The wife sued for divorce and other relief, most of which was granted by

⁸ The Government also contends that statements in letters from Colonel Morton's attorney infer that Colonel Morton did not intend to remain in Alaska, and that Colonel Morton did not consider Alaska to be his domicile. These factors certainly have relevance in a domicile determination. However, considering all the facts in evidence, we conclude that the trial judge correctly determined that these contentions are not sufficiently persuasive to warrant "any change in the opinion . . . that the plaintiff was a domiciliary of Alaska, and not of Alabama, when the divorce proceeding against him in Alabama was in progress."

⁹ It is also significant that, as related earlier, Mrs. Morton filed an affidavit declaring that Colonel Morton was, at the time of instigation of her suit, a "nonresident" of Alabama.

the lower court. Although upholding the lower court's granting of the divorce, the Alabama appellate court said, regarding the other relief:

In the present case, to put it succinctly, the defendant has never conducted any activity in the State of Alabama. Nothing in the record would suggest that any basis for the exercise of in personam jurisdiction over him in Alabama would exist. . . . Plaintiff . . . asserts that Alabama's strong interest in protecting the welfare of the minor child provides the sufficient "minimum contact." While this interest is unquestionably important, it simply does not make Alabama a fair forum in which to require the husband, who derives no personal or commercial benefit from the child's presence in Alabama, and who lacks any other relevant contact with the state, to defend a paternity determination therein. *Kulko v. Superior Court of California*, . . . 436 U.S. at 100, 98 S.Ct. at 1701. The unilateral activity of the wife in moving to Alabama cannot satisfy the requirement of the husband's "minimum contacts" with the forum state. It is essential in each case that there be some act by which the defendant purposely avails himself of the privilege of conducting activities in the forum state. *Hanson v. Denckla*, 357 U.S. 235

Finally, using a quasi in rem theory, the Government attempts to justify jurisdiction on the basis that Colonel Morton's salary, upon which Mrs. Morton and the children relied for support, was present in Alabama or, at least, subject to the jurisdiction of Alabama. This fails for two reasons: First, the suit was brought against Colonel Morton—not against his salary, which was not located in Alabama under that state's law. *Louisville & N.R. Co. v. Nash*, 118 Ala. 477, 23 So. 825 (1898). Second, even if his salary were considered to be located in Alabama, this would not support jurisdiction in view

of the Supreme Court's admonition in *Shaffer v. Heitner*, 433 U.S. 186, 209, 212 (1977):

[A]lthough the presence of the defendant's property in a State might suggest the existence of other ties among the defendant, the State, and the litigation, the presence of the property alone would not support the State's jurisdiction. If those other ties did not exist, cases over which the State is now thought to have jurisdiction could not be brought in that forum.

....

... [A]ll assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny. [Footnote omitted.]

See also *State Tax on Foreign-Held Bonds*, 82 U.S. 300, 320 (1872) ("All the property there can be . . . in debts of corporations, belongs to the creditors, to whom they are payable, and follows their domicile, wherever that may be. Their debts can have no locality separate from the parties to whom they are due.")¹⁰

Accordingly we conclude that Colonel Morton's contacts with the State of Alabama were too tenuous and insubstantial to support personal jurisdiction of the Alabama state court consistent with the "traditional notions of fair play and substantial justice" required to meet the test of due process under the Fourteenth Amendment to the Constitution. *International Shoe Co. v. Washington*, 326 U.S. at 316.

From the foregoing, it follows that the writs of garnishment issued by the Alabama state court were not issued by a "court of competent jurisdiction" as required by 42 U.S.C. § 662(e) and, therefore, did not constitute

¹⁰ This, of course, suggests a further reason for concluding that the Alabama court was not a court of competent jurisdiction, because it lacked jurisdiction over the Government's debt to Colonel Morton which it sought to garnish.

"legal process" for purposes of 42 U.S.C. § 659. To hold otherwise and to require (as would the dissent) Colonel Morton, a resident of Alaska, to proceed in the Alabama state court against Mrs. Morton would, in effect, render those statutes violative of constitutional due process, contrary to the principles that a court should construe legislative enactments to avoid constitutional difficulties if possible. *United States v. Clark*, 455 U.S. 23, 34 (1980); *United States v. Harriss*, 347 U.S. 612, 618 (1954); *Blasecki v. City of Durham*, 456 F.2d 87, 93 (4th Cir.), *cert. denied*, 409 U.S. 912 (1972). This is particularly so where, as here, there is no legislative history of the statutes suggesting a contrary interpretation.

At the same time, we hold that the immunity provisions of the garnishment statute permit the Government, where the process document is regular on its face, to make payment without liability on a presumption that the underlying judgment is valid.¹¹ but that such a presumption is rebuttable by a showing that the Government had notice of a substantial claim of jurisdictional irregularity.¹² That is the case here. The Department of the Air Force, through its Finance Office at Elmendorf, had information sufficient to give notice of apparent lack of personal jurisdiction in the Alabama court in the underlying suit. The record supplied to the Finance Office by Colonel Morton included an affidavit executed by Mrs. Morton upon instigation of her suit admitting that Colonel Morton was at that time a "non-resident" of Alabama. Also, the trial judge found that, unlike the situation in the *Calhoun* case, the State of Alabama had no "long-arm" statute at the time of fil-

¹¹ *Cf. Insurance Corp. v. Compagnie des Bauxites*, — U.S. —, 102 S. Ct. 2099, 2107 (1982).

¹² We need not decide whether a mere nonfrivolous claim would rebut the presumption that a process document has been issued by a court of competent jurisdiction.

ing of the suit by Mrs. Morton which enabled it to exert personal jurisdiction for alimony or child support over nonresidents solely by service of process by registered mail.¹³

The Finance Office disregarded the information showing jurisdictional irregularity in the underlying Alabama suit. This was exacerbated by the fact that Colonel Morton's position was based on advice from the Department's Judge Advocate's Office at Elmendorf. Our conclusion that the presumption, that a process document regular on its face is supported by a valid underlying judgment, is rebuttable places no greater burden on the Government in this case than that already assumed by it when, through the base Judge Advocate's Office, it responded to Colonel Morton's request with legal advice based on information sufficient to rebut the presumption that the judgment in the underlying suit was valid. We are not persuaded by the Government's argument that, were we to hold in Colonel Morton's favor, on the facts of this case, the result would be an administrative nightmare. (See second paragraph of note 14, *infra*.)

Accordingly, the Government is liable under the Fifth Amendment to the Constitution for monies wrongfully paid pursuant to the Alabama court's writs, said monies being those which had accrued to Colonel Morton under Title 37, United States Code.

¹³ Trial Judge Finding of Fact No. 31:

In 1974 and 1975, during the pendency of the divorce proceeding instituted by Patricia Kay Morton against Colonel Morton, the State of Alabama did not have a "long-arm" statute authorizing personal service on nonresidents for child custody, child support, or maintenance and support. At that time, the Alabama rule permitting substituted service was limited to the termination of the marital status, in the absence of the necessary "minimum contacts" required for the Alabama court to exercise personal jurisdiction over a nonresident defendant.

The judgment of the Claims Court is affirmed, and the cause is remanded for a determination of quantum.¹⁴

AFFIRMED

¹⁴ It should be pointed out that the Supreme Court, in *Kulko*, observed that both California and New York had adopted versions of the Uniform Reciprocal Enforcement of Support Act, which is designed to "facilitate the procurement and enforcement of child-support decrees where the dependent children reside in a State that cannot obtain personal jurisdiction over the defendant." 436 U.S. at 99. The Court reasoned that because "the Uniform Acts will facilitate both [Mrs. Kulko's] prosecution of a claim for additional support and collection of any support payments found to be owed by [Mr. Kulko] . . . it cannot here be concluded . . . that resident plaintiffs would be at a 'severe disadvantage' if *in personam* jurisdiction over out-of-state defendants were sometimes unavailable." *Id.* at 100 & n.15.

In this case, had the Air Force Finance Office refused to honor the writs of garnishment, Mrs. Morton's interests were similarly protected, because both Alabama and Alaska had adopted the Uniform Reciprocal Enforcement of Support Act. *Ala. Code* § 30-4-80 *et seq.* (1975); *Alaska Stat.* § 25.25.010 *et seq.* (1977). We note that all fifty states, the District of Columbia, Puerto Rico, and the Virgin Islands have adopted the Uniform Reciprocal Enforcement of Support Act. *Am. Jur. 2d Desk Book, Supp.* 1982.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appeal No. 290-77

ALLAN WAYNE MORTON, APPELLANT

v.

THE UNITED STATES, APPELLEE

NIES, *Circuit Judge*, dissenting.

I

I dissent. In summary, my reasons are:

1. *Colonel Morton has no unsatisfied claim for statutory pay.* Morton's claim has been discharged by payment to the Alabama court even if the underlying judgment were void or had been set aside. An employee has no claim against his employer for failing to litigate the validity of a pre-existing judgment on which garnishment is based.

2. *The United States has specifically reserved its immunity from suit* (whether viewed as a statutory claim, a violation of fiduciary duty, a suit for wrongful garnishment, or an action based on abuse of administrative discretion). The majority, in effect, interprets the statutory reservation of sovereign immunity to impose liability.

3. *Absence of binding judgment on affected parties.* The judgment of the Claims Court must be vacated because of the absence of indispensable parties, namely, the dependents of Colonel Morton who benefited by the garnishment.

4. *Principles of comity and federalism require that Colonel Morton seek relief in the Alabama courts.* The majority's holding that the underlying Alabama judgment against Colonel Morton is void violates these principles.

5. *The exercise of jurisdiction by the Alabama Court over Colonel Morton in 1974 does not offend concepts of due process.* Colonel Morton was purposely availing himself of the privileges of the state of Alabama at that time in the conduct of his personal affairs.

I base these conclusions on the following key factors. First, the facial validity of the writs served on the Government, as well as the judgment for alimony and child support which accompanied the garnishment process, is unquestioned and unquestionable. Second, Morton does not dispute that he received actual notice of the divorce decree, the writs, and the Government's answers. Third, the judgment for alimony and child support, while based on a default, was entered only after a hearing before the Alabama court and open court testimony by Mrs. Morton. The court was aware that Colonel Morton was a nonresident of Alabama and, nevertheless, found it had jurisdiction over him to enter the monetary judgment.

Finally, but most importantly, the legislative history of the Social Services Amendments of 1974, Pub. L. No. 93-647, 88 Stat. 2337 (1975) (S. Rep. No. 93-1356, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 8133), shows that the purpose in allowing garnishment, which came into being by that statute, was to aid the states and federal Government in reducing public aid to dependent children. Garnishment of federal wages is allowed only for support payments of dependents. The majority entirely frustrates this purpose.

II

Morton's pay claim has been discharged

The fundamental error which pervades the majority opinion is its unquestioning acceptance of the premise

that a private employer would remain liable to an employee for wages under the circumstances here. Thus, the majority finds it necessary to discuss only the issue of sovereign immunity. Since a private employer would not be liable under similar circumstances, consideration of sovereign immunity would be unnecessary except that, if there is immunity, a fundamental question of the court's jurisdiction is raised.

It has been the position of Morton throughout these proceedings that, regardless of facial validity, where garnishment proceedings are based on a void judgment, payment by the garnishee is, ipso facto, illegal, so that the garnishee remains liable on his debt to the judgment-debtor. This legal premise is erroneous, but it is the basis for liability adopted by the trial court and purportedly by the majority.¹ As stated in the trial judge's opinion (Slip Op. at 21-22):

The writs of garnishment involved in the present case were issued as incidents to the decree of the Alabama court. As the decree of the Alabama court was void for lack of jurisdiction insofar as it ordered Colonel Morton to make alimony and child support payments to Patricia Kay Morton, the writs of garnishment must necessarily fall along with the portion of the decree of which they were based. *Laborde v. Ubarri*, 214 U.S. 173, 174 (1909).

* * * * *

For the reasons previously outlined, it is concluded that the Air Force Finance Office acted arbitrarily and illegally when it ignored the plaintiff's protest that the Alabama court did not have jurisdiction to enter a money judgment against him for alimony and child support, made deductions from plaintiff's pay, and paid the money over to the Cir-

¹ After many readings of the majority opinion, I can only conclude that the majority's theory of liability sounds in tort rather than being based on a statutory pay claim, i.e., on a debt.

cuit Court for the Tenth Judicial Circuit of Alabama pursuant to writs of garnishment that were void because they were ancillary to a court decree which was void for lack of jurisdiction insofar as it ordered Colonel Morton to make alimony and child support payments to Patricia Kay Morton.

Morton's argument begins with an analysis of divorce law² leading to the conclusion that a court must have personal jurisdiction over the defendant in a divorce action to enter a monetary judgment. No one takes issue with this premise. Then, he correctly states that garnishment proceedings are ancillary to the principal action. Thus, if the original judgment is held to be void, the ancillary writ of garnishment also falls. *La-borde v. Ubarri*, 214 U.S. 173 (1909); *Wilkinson v. Cohen*, 257 Ala. 16, 57 So.2d 108 (1952). This precedent does not establish that a *garnishee* remains liable because execution was obtained against him on a void judgment. No such precedent exists. Rather, the cited precedent establishes that if the underlying judgment is set aside, the *judgment-creditor* must return the property he obtained by garnishment. Thus, the cases deal with the rights of Colonel Morton against Mrs. Morton, not against the United States.

Similarly, no precedent relevant to this case can be derived from prejudgment garnishment cases on which

² This case was previously before the United States Court of Claims on cross motions for summary judgment, which were denied without prejudice. The court did not make any determination, legal or factual, on any issue, inasmuch as it found the record inadequate. The issue of liability of an ordinary garnishee was raised in the briefs on the motions for summary judgment, and the arguments previously advanced by Morton have been taken into account. The issue of immunity came into this case only after enactment of 42 U.S.C. § 659(f). Because the issue of liability has never been fully briefed by the Government and because I find this issue in itself dispositive, it has been developed here. Also the immunity provision cannot be interpreted properly, in my view, without full appreciation of the issue of liability.

Morton and the majority rely. (*See* n.4, *infra*.) The United States was in no way responsible for the underlying judgment against Colonel Morton. Indeed, the general principles to be applied here are more appropriately found in the Law of Judgments. In any event, since garnishment is a creation of state statutory law, in determining whether the United States as a garnisheed employer has fulfilled its obligations, we first must look to state law for guidance and in particular to the law of Alabama.

In establishing garnishment procedures, the various states can impose whatever duties their citizens find appropriate on a garnishee, and by waiver of immunity the United States has made itself subject to these state laws like an ordinary employer. The obligations imposed by a state on a garnishee must, of course, take into account the due process rights of a garnishee which are as important as the due process rights of a judgment-debtor. The majority, without any analysis of the Alabama statute, finds a duty on an employer served with garnishment to carry the burden of litigation for his employee on penalty of double liability. Such an obligation would clearly violate the due process rights of a garnishee. The employer/garnishee has no interest in the litigation, being merely a stakeholder, and cannot be made to shoulder the burden and expense of litigation for someone else. Indeed, I believe the concept of imposing a duty to litigate the underlying judgment would be unthinkable, except for the fact that the employer here is the Government. However, the relationship between the Government and Colonel Morton in garnishment proceedings is in no way unique. It should at least give the majority pause that out of the thousands and thousands of garnishment proceedings against employers each month, not one case can be cited where an employer was held liable to this employee because the underlying judgment was void or because the employer failed to litigate the issue of its validity for his employee. Anyone who

has ever dealt with garnishment involving private employees would be aware that employees routinely tell their employers, when informed of garnishment, that the judgment was satisfied, that they were not served, or that they will sue if they do not get their wages, just as Colonel Morton did here. Such statements do not affect a private employer's duty or liability. Employers must pay according to the court's direction, assuming the employer is subject to the court's jurisdiction. It is horn-book law in garnishment proceedings throughout the states that the employee has the obligation to challenge the garnishor before the court which allowed garnishment. *Calhoun v. United States*, 557 F.2d 401 (4th Cir.) (*per curiam*), *cert. denied*, 434 U.S. 966 (1977).

Under Alabama law, nothing could be clearer than that Morton would have no claim against a private employer merely because the underlying judgment is void. Upon proper service of a writ on an employer, the employer has no option but to answer, stating the amount of indebtedness to its employee. The majority suggests the Government should have "refused to honor" the writ. No private employer has that right, and under 42 U.S.C. § 659(a) (1976 & Supp. IV 1980) the Government is treated "in like manner and to the same extent as if the United States . . . were a private person." The United States could no more "refuse to honor" the writ summoning the Government to the Alabama court than it could "refuse to honor" the summons by the Court of Claims. The United States had to answer, and in its answer had to state whether or not it owed money to Colonel Morton. Ala. Code §§ 6-6-393 and 6-6-450 (1975).³ Once an employer's answer admits the amount

³ The Alabama code applicable when garnishment was had in 1977-78 is found in Ala. Code § 6-6-370 *et seq.* (1975) (Article 9). All references are to the 1975 Compilation of the Alabama Code unless indicated otherwise. Pertinent sections are set forth in the appendix. Contrary to n. 10, *ante*, wages payable outside the state are subject to garnishment if the employer does business in the state. *Orroz Corp. v. Orr*, 384 So.2d 1170 (Ala. 1978).

of garnishable indebtedness, or if the employer fails to answer, a judgment *must* be entered against the employer in favor of the garnishor (i.e., Mrs. Morton). *Id.* §§ 6-6-454 and 6-6-457. Where the garnishment is on an existing judgment, an employee may post bond to stop the garnishment. *Id.* § 6-6-430(a). Where no bond is given and the garnisheed employer pays to the court, § 6-6-453(a) provides: "Such payment has the effect to discharge the garnishee from liability for the amount so paid"

As further protection of the garnishee from the debtor, (i.e., the United States from Colonel Morton), the statute provides in § 6-6-461:

The judgment condemning the debt, money or effects to the satisfaction of the plaintiff's [Mrs. Morton's] demand is conclusive as between the garnishee [the United States] and the defendant [Colonel Morton] to the extent of such judgment, unless the defendant prosecutes to effect an appeal from such judgment, which he may do in his own name; and, if such judgment is stayed by bond and the garnishee is notified of the fact, he is not permitted to discharge such judgment pending appeal.

No Alabama case law construes the protection given the garnishee from a subsequent action by the judgment-debtor as in any way conditional on the actual validity of the underlying judgment. As early as 1878, the Supreme Court of Alabama held in *Montgomery Gas Light Co. v. Merrick & Sons*, 61 Ala. 534 (1878):

Since the garnishee stands in relation of indifference between the plaintiff and the defendant, the court will protect him against the jeopardy of a double satisfaction, if an action is commenced against him by the defendant.

In construing a Georgia statute paralleling that of Alabama, Judge O'Kelley, in *West v. West*, 402 F. Supp.

1189 (N.D. Ga. 1975), provided the following perceptive analysis of the role and liability of an employer (in that case also the federal Government) who becomes involved in garnishment proceedings:

Under Georgia law, when a garnishee answers the summons of garnishment, the statements in the answer are accepted as true, and the garnishee is discharged from all further liability unless either the claimant or the defendant files a traverse contesting the answer. Ga. Code Ann. § 46-303 (Rev. 1974); *Peaslee-Gaulbert Corp. v. Okarma*, 97 Ga. App. 809, 104 S.E.2d 548 (1958).

* * * * *

If the fact and amount of the government's debt to the defendant is not challenged, the garnishee has no further liability and is no longer interested in the litigation.

Id. at 1191-92. See also *Garrett v. Hoffman*, 441 F. Supp. 1151, 1157 (E.D. Pa. 1977) ("[A] Florida writ, once served on the Federal defendants, rendered them liable for [garnishor/wife] for plaintiff's accrued retirement pay for the month in question.").

The majority does not make any analysis of Alabama law or of a private employer's liability except to indicate in a footnote (n. 5, *ante*) that liability is "well-settled," referring the reader to 38 C.J.S. *Garnishment* §§ 244, 231 (1955) and cases cited therein.⁴ However, the authority

⁴ In looking for precedent in garnishment proceedings, as previously indicated, one must distinguish between cases where the underlying judgment was obtained prior to the garnishee's involvement and those where the presence of the garnishee, or the "res" he holds, provides the jurisdictional basis for the judgment against the person whose property is garnished. Greater duties may have been imposed in pre-judgment garnishment, but after recent decisions of the U.S. Supreme Court these cases have little, if any, continued validity, in any event. See Note, *Garnishment in Alabama*, 29 Ala. L. Rev. 649, 661-67 (1978), for a discussion of the effect of these decisions on Alabama law. *Cole v. Randall Park Holding Co.*, 201

cited, upon examination, fails to provide any support for the summary disposition of this issue by the majority. Indeed, the only attempts by an employee to subject an employer to double liability, by reason of failing to make a collateral attack on the underlying judgment, have been against the Government and in all cases, except this one, such attempts have received short shrift.

The Fourth Circuit in the landmark case directly on point, *Calhoun v. United States*, *supra*, which was fully briefed up to the Supreme Court, reached a conclusion directly contrary to the majority. The pertinent facts on the issue of liability in *Calhoun* are indistinguishable from the facts at hand.⁵ An officer sued for his statutory pay under the Tucker Act.⁶ Commander Calhoun had received service by mail in Virginia relating to California divorce proceedings after his wife abandoned him and moved to California. Commander Calhoun did not answer or appear in the proceedings. His wife was granted a

Md. 616, 95 A.2d 273 (1953), and *Egnatik v. Riverview State Bank of Kansas City*, 114 Kan. 105, 216 P. 1100 (1923), cited by appellant, and the cases at 38 C.J.S. *Garnishment* § 244 (1955), are cases of this nature and have no applicability to garnishment in aid of execution on a pre-existing judgment. Here the United States was in no way responsible for the judgment of alimony and child support against Colonel Morton, and, indeed, was not subject to garnishment suits at the time the suit was begun. See *Garrett v. Hoffman*, 441 F. Supp. 1151, 1158 (E.D. Pa. 1977), which discusses this difference in connection with garnishment of federal wages. The majority also cites 38 C.J.S. *Garnishment* § 311 (1955) and dictum in *Betts v. Coltes*, 467 F. Supp. 544 (D. Hawaii 1979), concerning actions for wrongful garnishment, tort cases not within the jurisdiction of the trial forum here, and/or excessive garnishment, not relevant here.

⁵ On the issue of *in personam* jurisdiction, the facts detailed in the trial court and appellate opinions show that Commander Calhoun had no connection with California, unlike Colonel Morton with Alabama.

⁶ The jurisdiction of the district courts was identical at that time with the former United States Court of Claims except for amount in such cases. 28 U.S.C. § 1346(a) (2) (1976).

divorce and an award of alimony and child support. Mrs. Calhoun applied to the California court for a writ of garnishment on that judgment. Commander Calhoun received notice of garnishment from the court and from the Navy Family Allowance Activity. His attorney informed the Navy that the California court had no *in personam* jurisdiction over Commander Calhoun when it entered the support decree, since he was not resident, domiciled, served with process or otherwise engaged in activities in California. Like Morton, he asserted that the Government was obligated to attack the California decree. All of the arguments advanced by Colonel Morton were advanced by Commander Calhoun. In a *per curiam* opinion of Chief Judge Haynsworth and Judges Butzner and Russell, the court affirmed the grant of summary judgment to the Government, applying the same law to the Government as that applicable to a private employer:

It is clear that the employer, on receipt of the garnishment notice, must give notice to its employee that it has been served so that the employee has the opportunity to defend himself. *See Harris v. Balk*, 198 U.S. 215, 25 S.Ct. 625, 49 L.Ed. 1023 (1904). The employer has a greater obligation only where the underlying judgment is void on its face.

In this case, the divorce judgment is facially valid. Service by mail was had in accordance with the California Code of Civil Procedure § 415.20. The asserted invalidity is the California court's lack of *in personam* jurisdiction over Calhoun. The question as to *in personam* jurisdiction will probably be whether Calhoun was a domiciliary resident or citizen of California. Calhoun is assuredly in a better position to effectively litigate that issue than is the United States. *The United States was under no duty to contest the judgment, exposing itself to potential double liabilities.* It was Calhoun's obligation to

attack the judgment if he wished to avoid the deduction from his pay.

557 F.2d at 402 (emphasis added).

The majority attempts to distinguish *Calhoun* from the case at hand by reliance on the finding of the trial judge here that Alabama had no "long-arm" statute comparable to that of California. (n. 13, *ante*.) Not only is absence of a statute immaterial in view of the judicially established law in Alabama,⁷ but also the existence of a long-arm statute does not change the issue of whether Calhoun and Morton could be subject, as a matter of due process, to the jurisdiction of the respective courts. *Kulko v. California Superior Court*, 436 U.S. 84 (1978).

The *Calhoun* court did not exonerate the United States because the underlying judgment was not void, but because, in its view, it was not incumbent on an employer

⁷ Contrary to the majority view, a long-arm statute is not necessary to confer jurisdiction on the Alabama state court. Such jurisdiction may be exercised unless restricted by a long-arm statute or other jurisdictional limitation. The Alabama Supreme Court in *New York Times v. Sullivan*, 273 Ala. 656, 144 So.2d 25, 34 (1962), *rev'd on other grounds*, 376 U.S. 254 (1964), had declared that Alabama jurisdiction extended to the full extent allowed by due process and permitted service by mail on non-residents. *See also Ex parte Martin*, 281 Ala. 135, 199 So.2d 836 (1967). Rule 4.2 was adopted by the Alabama Supreme Court to clarify the former Rule 4 of the Alabama Code of Civil Procedure (effective July 3, 1973, and published at 290 Ala. 373 (1973)). The new rules, while making explicit that Alabama asserts "long-arm" jurisdiction as far as due process will allow, does not represent any expansion of the jurisdiction of Alabama courts over what it was at the time Mrs. Morton filed her complaint against Colonel Morton. Code of Alabama, Tit. 13, § 17(a) (1971) (1973 Cum. Supp.). *See generally*, "Committee Comments on Proposed Amendments to the Alabama Code of Civil Procedure," 37 Alabama Lawyer 84 (April 1976).

The majority states there was no "personal service" on Colonel Morton, using the term in the narrow sense of delivery of a summons to him personally within the state. He was properly served by mail pursuant to the court's direction if he was subject to the court's jurisdiction. There is no challenge to the adequacy of the notice he actually received of all proceedings.

to look behind the *facial* validity of the garnishment process. The Fourth Circuit refused to undertake the ill-advised plunge into the facts taken by the majority here. It relied on the *statement* of the California court that it had jurisdiction. The Alabama divorce decree which was served on the United States with the writ in issue here begins with the equivalent *statement*: "It appearing in this cause that the Defendant was duly served and failed to appear"

It must be emphasized that the *Calhoun* court was addressing only the issue of liability. While garnishment of federal wages came into being in 1975, the immunity provision and the definitions in 42 U.S.C. § 662 relating thereto, discussed *infra*, were not enacted until 1977 and were not at issue in *Calhoun*. Thus, without the immunity provision, the *Calhoun* court found no liability. The majority's treatment of *Calhoun* in its discussion of immunity illustrates the confusion which I find throughout the opinion between immunity and liability.

Relief from Void Judgments

The majority puts forth no basis for liability other than that a garnisheed employer would remain liable to an employee for paying a void judgment against his employee. Void to the majority means void for all purposes and with respect to all persons. This conclusion is not only in error as a matter of garnishment law but also contravenes accepted principles of the effect which must be given to void judgments, particularly where the rights of third parties would be adversely affected. To avoid belaboring this point, I will only call attention to the American Law Institute's recently published Restatement (Second) of Judgments (1982), which contains lucid explanations throughout the two volumes why the majority's simplistic view is in error. Of particular interest is § 16 Comment *c* (pp. 146-47 of Vol. 1), which analyzes the problem of a judgment based on a void judgment as follows:

As stated in Comment *a* above, the problem when met head-on is that of a judgment based and dependent upon an earlier judgment which is subsequently nullified. It has been contended that the later judgment should then be automatically nullified. The current doctrine, however, is that the later judgment remains valid, but a party, upon a showing that the earlier judgment has been nullified and that relief from the later judgment is warranted, may by appropriate proceedings secure such relief.

If, when the earlier judgment is set aside or reversed, the later judgment is still subject to a post-judgment motion for a new trial or the like, or is still open to appeal, or such a motion has actually been made and is pending or an appeal has been taken and remains undecided, a party may inform the trial or appellate court of the nullification of the earlier judgment and the consequence elimination of the basis for the later judgment. The court should then normally set aside the later judgment. When the later judgment is no longer open to a motion for a new trial or the like at the trial court level, nor subject to appeal, the fact of the nullification of the earlier judgment may be made the ground for appropriate proceedings for relief from the later judgment with any suitable provision for restitution of benefits that may have been obtained under that judgment.

It must be borne in mind that relief from any judgment is based on equitable principles and that restitution can be obtained only from one who benefited by the judgment. This is the thrust of the decision of the Supreme Court in *Laborde v. Ubarri*, *supra* (attachor required to return property). Similarly, in a recent decision, *Harris v. National Bank & Trust Co.*, 406 So.2d 968 (Ala. Civ. App. 1981), where a writ of garnishment was void, an employee was held to be entitled to return of her garnisheed wages from the person (garnishor or employer) *who was holding them*. Thus, if Colonel Morton is entitled to relief from the Alabama judgments, the

proper defendant is his wife, not the United States. *Tinnin v. Tinnin*, 391 So.2d 1047 (Ala. Civ. App. 1980).

Conclusion on Liability

The trial court erred as a matter of law in finding the United States liable under the precedent of *Laborde v. Ubarri*, *supra*. The majority similarly assumes liability, if there is no immunity.⁸ I would hold for the Government on the issue of liability.

III

Interpretation of 42 U.S.C. § 659(f)

The majority wholly ignores the interpretation of the subject statute given by the Comptroller General of the United States and more than eight years of established administrative practice. Indeed, the majority appears unaware that the current garnishment regulations of the Office of Personnel Management, 5 C.F.R. § 581.101 *et seq.* (1981) (which are basic to the regulations of all agencies), are void if the majority opinion stands. Moreover, these regulations were entirely in accordance with the decisions of all other federal courts which had interpreted the statute and the obligations of the Government as a garnishee before this court's decision. In view of the plenary appellate jurisdiction of this court over these cases, *see* 28 U.S.C. §§ 1295(a) (2) and (3), regulations

⁸ The majority has laced its opinion with constitutional overtones. In connection with a claim to statutory pay, this adds nothing to Morton's claim. *Testan v. United States*, 424 U.S. 392 (1976). Morton's due process rights were, in any event, fully protected by his right to defend the garnishment proceeding, as he had a right to do under Alabama law, as a party. *Harris v. National Bank & Trust Co.*, 406 So.2d 968 (Ala. Civ. App. 1981). Despite at least three opportunities (three to five writs have been served), Morton wholly failed to avail himself of state procedures which would have protected him from wrongful garnishment. The majority's solicitude for his due process rights appears misplaced. By choice, he purposefully ignored the safeguards available to him.

of all federal agencies must be made to conform to the majority decision, which in my view is equally in error on the issue of immunity as on liability.

Sovereign immunity is deemed waived by the various statutes under which persons employed by the Government are entitled to pay. 42 U.S.C. § 659, enacted in 1975, waives sovereign immunity to allow garnishment of federal wages for the limited purpose of family support. After a flurry of litigation against the Government regarding garnishment, in 1977 the garnishment statute was amended (Tax Reduction and Simplification Act of 1977, Pub. L. No. 95-30, § 501, 91 Stat. 126, 157 (1977)) specifically to reassert sovereign immunity with respect to claims of employees whose wages had been garnished. Any pay claim is, thus, limited by the final paragraph of 42 U.S.C. § 659:^{*}

(f) Neither the United States, any disbursing officer, nor governmental entity shall be liable with respect to any payment made from moneys due or payable from the United States to any individual pursuant to legal process regular on its face, if such payment is made in accordance with this section and the regulations issued to carry out this section.

This immunity provision, in fact, parallels generally the scope of a garnishee's liability as defined by the Alabama courts and in *Calhoun*. The immunity provision has the effect of a limitation or prohibition against imposition of greater duties on the Government by any state and, thus, is an aid to administration in that garnishment from all states can be treated uniformly. Since 42 U.S.C. 659(f) by its terms is satisfied here, Morton's claim should be dismissed for lack of jurisdiction. The majority, however, finds no immunity by interpreting the reserva-

^{*} While the section is entitled "Non-liability," it is considered by the parties and the majority as a reservation of immunity, and for purposes here, I will also treat it as an immunity statute. The statute could also be treated as an affirmative defense to a pay claim.

tion of immunity narrowly and by the addition of qualifying phrases, contrary to repeated instruction of the Supreme Court that consent must be "unequivocally expressed." *United States v. Mitchell*, 445 U.S. 535, 538 (1980); *United States v. Testan*, 424 U.S. 392, 399 (1976).

The majority first construes the immunity statute to require that the court which issued the underlying judgment must have jurisdiction over the subject matter and *in personam* jurisdiction over the employee. Only then, in the majority view, is the court a "court of competent jurisdiction" within the meaning of 42 U.S.C. § 662 (Supp. IV 1980), the section in which "legal process" is defined. By finding that the Alabama court had no jurisdiction over Morton, the Alabama court could not issue "legal process" ["[T]he writs . . . did not constitute legal process for purposes of 42 U.S.C. § 659," *ante* at 20]. Thus, it would seem unnecessary to read further into 42 U.S.C. § 659 to say there is *no* sovereign immunity, and in fact, the majority's analysis entitled "Immunity" ends at this point.¹⁰

The majority at the end of its opinion then appears to have second thoughts about the absolutism of its holding on immunity and steps back to modify its position, concluding:

At the same time, we hold that the immunity provisions of the garnishment statute permit the Government, where the process document is regular on its face, to make payment without liability on a presumption that the underlying judgment is valid.

...

Ante, at 20-21.

¹⁰ The majority similarly relies on the necessity for a "legal obligation" in 42 U.S.C. § 659(a) (1976 & Supp. IV 1980). Apparently the majority rejects the view of Congress that "all children have the right to receive support from their fathers." S. Rep. No. 93-1356, 93rd Cong., 2d Sess., *reprinted* in 1974 U.S. Code Cong. & Ad. News 8133, 8146.

Since all process served here is regular on its face and the Government would be exculpated, the majority has to turn again, and adds:

[B]ut that such presumption is rebuttable by a showing that the Government had notice of a substantial claim of jurisdictional irregularity.

Ante, at 21. In effect, the majority accepts the immunity statute as written but adds its own proviso.

What the majority is, in fact, doing is construing the immunity statute to impose liability on a theory of negligence or breach of fiduciary duty. Indeed, its entire two factor analysis of "court of competent jurisdiction" is simply irrelevant to its own conclusion. The majority adopts no absolute requirement for either subject matter or personal jurisdiction. In my view, to be a "court of competent jurisdiction" the court must have subject matter jurisdiction.

Since the majority is basing the allowance of Morton's claim on the conduct of the Air Force and Morton, it is appropriate to look at what steps the Government took and what "notice" Morton gave the Government.

To begin with, when Colonel Morton sought advice in 1975 concerning the judgment awarding alimony and child support to Mrs. Morton, the Air Force advised him that a court entering a monetary decree had to have personal jurisdiction over him. That advice was correct. Personal jurisdiction does not, of course, require personal service, in the sense of service on Colonel Morton in Alabama. Service by mail, as authorized by the Alabama court here, is sufficient for the exercise of personal jurisdiction if Colonel Morton had sufficient contacts with Alabama.

With respect to the subsequent writs of garnishment, Morton does not challenge the facts set forth in the following affidavit:

State of Colorado)
)
 City and County of Denver)

AFFIDAVIT

James R. Russell, Affiant, being first duly sworn, upon oath deposes and states as follows:

1. Affiant is a civilian Attorney-Advisor assigned to the Office of the Staff Judge Advocate, Air Force Accounting and Finance Center, Denver CO 80279. Affiant's duties principally involve legal review of State garnishment and similar processes served on the United States Air Force pursuant to 42 U.S.C. 659.

2. On 27 December 1976, the United States Air Force was served by certified mail with a Writ of Garnishment seeking to garnish the pay of Col Allan W. Morton. When the Writ of Garnishment was submitted to AFAFC/JA for legal review, it was randomly assigned to Affiant. In legal review, Affiant observed:

a. The Writ of Garnishment served was the "regular" form used in the State of Alabama. It was issued by the Register of the Tenth Judicial Circuit Court. (Attachment 1.)

b. The Writ of Garnishment recited a decree entered in the cause dated 14 August 1975.

c. The Writ recited on its face that it sought "alimony and child support" in the amount of \$4,100.00.

d. The Writ was accompanied by an Affidavit executed by Patricia K. Morton which recited the Judgment dated 14 August 1975 and that \$4,100.00 was due and owing for alimony and child support. (Attachment 2.)

e. The Writ was accompanied by a copy of a "Final Judgment of Divorce". In paragraph 5, such

Judgment demonstrated that \$500.00 per month was made against Allan W. Morton "as alimony for plaintiff and partial support and maintenance of the said minor children". The Judgment recited in its first line, "It appearing of record in this cause that the defendant was duly served and failed to appear . . .". (Attachment 3.)

3. Based upon the observation in paragraph 2 hereof, Affiant determined that the Writ of Garnishment was issued under the authority of the Circuit Court and such had proper subject matter jurisdiction; that the collection was for child support and alimony and was therefore within the "waiver of sovereign immunity" imparted by 42 U.S.C. 659; that such Writ was issued upon Affidavit and was based upon a Final Judgment of Divorce which included an alimony and child support award; and that the Final Judgment of Divorce recited, "defendant was duly served", and did not by its face raise personal jurisdiction questions. The Writ of Garnishment was determined to be legally sufficient to the extent of \$4,100.00. At such time, the position of the United States Air Force was that "costs" were not within the scope of the waiver of sovereign immunity.

4. On or about 30 December 1976, Mr. Johnny Nieto, AFAFC/JA, then the senior attorney assigned to garnishment duties and Affiant's supervisor, received a telephone call from Col Morton essentially alleging that the Alabama garnishment was invalid as no personal service of process was made. Mr. Nieto referred the information to Affiant and, on or about 30 December 1976, Affiant "stayed" compliance with the Writ pending receipt of documentation which Col Morton had indicated he would send.

5. On or about 10 January 1977, Affiant received a call from Col Morton, the nature of which was to

advise that he was going to sue Affiant personally. In this conversation, Col Morton advised Affiant he had received service of process in the Alabama divorce proceeding by registered mail.

6. By letter dated 30 December 1976, Col Morton presented arguments that he had paid the obligation; that he was never served or notified of the proceeding; and that he was neither domiciled or a resident of Alabama. (Attachment 4.) In support of his arguments, Col Morton attached copies of five letters. (Attachment 5.) The letters were essentially the opinion of his legal counsel as to the validity of the Alabama divorce. The letters contained nothing that had any bearing on the recitation in the Judgment that "defendant was duly served". *Further, the letters demonstrated that Col Morton was a domiciliary of the State of Alabama who was advised by counsel on 18 August 1976 to change his legal place of residence.* [Emphasis added.]

7. On 11 January 1977, an Answer was filed in the Alabama Court confessing indebtedness of \$4,100.00 and such amount was subsequently paid to the Clerk of the Circuit Court. (Attachment 6.) Col Morton was advised by letter dated 14 January 1977 that the Alabama process was regular and valid on its face and would be honored. (Attachment 7.)

8. By telephone conversation 31 January 1977, Kaletah Carroll, plaintiff's counsel herein, advised Affiant of her opinion of Alabama law and stated that no personal service of process had been made. By letter dated 29 March 1977, Kaletah Carroll provided documentation affirmatively demonstrating that Col Morton was served in the Alabama divorce proceeding by registered "return receipt requested" mail. (Attachment 8.)

9. On 2 May 1977, the United States Air Force was served with a second writ of Garnishment seeking

\$1,750.00. (Attachment 9.) A Motion for Enlargement of Time of [sic] Answer was filed due to the enactment of Pub. L. 95-30 (23 May 1977). (Attachment 10.) Since Affiant was under threat of personal suit, the question of validity of service of process by registered mail was posed to the U.S. Attorney in Birmingham AL by letter dated 1 June 1977. (Attachment 11.) The U.S. Attorney advised that such service was sufficient pursuant to Rule 4.2, Alabama Rules of Civil Procedure. (Attachment 12.) An Answer to such Writ is due 6 July 1977 and such process has been determined legally sufficient and such answer was filed 30 June 1977 (Attachment 13); however, amounts due thereunder have not been paid as of present to the Clerk of the Court.

10. Attachments referred to herein are by this reference incorporated herein.

FURTHER, Affiant saith not.

/s/ James R. Russell
JAMES R. RUSSELL
Affiant

Subscribed and sworn to before me by James R. Russell this 30th day of June, 1977.

/s/ Patricia A. Stichter
PATRICIA A. STICHTER
Notary Public

My Commission expires 21 June, 1980.

The affidavit is confirmed by Mr. Russell's letter of January 14, 1977, to Colonel Morton which states:

To begin, Public Law 93-647, codified at 42 U.S.C. § 659 enters the consent of the United States to

garnishment and similar processes of the states. No federal law of garnishment was created, and consequently, all questions of law are resolved by reference to the law of the issuing state.

* * * * *

We are precluded, as are US Attorneys, from raising any matter in the nature of a defense which belongs to the member. Further, we have no adjudicatory [sic] authority in factual matters. Even if it is proven to us that you have made the payments alleged as delinquent in the process, we still cannot disobey the court order. Such would be a defense that, by necessity, would have to be raised by you in the Alabama court.

The divorce decree herein recites that "Defendant was duly served and failed to appear within the time required". Such may be untrue; however, it validates the face of the instrument. Any defect in jurisdiction or notice must be raised in the court.

The test of whether a court may exercise power over you is not limited to domicile or residence. There are many circumstances which would meet the "minimum contacts" required by the Supreme Court pronouncements in *Hanson v. Denckla*, 357 U.S. 235 and *International Shoe v. Washington*, 326, [sic] U.S. 310.

The Government's advice that it could not undertake to challenge the alimony/child support decree on his behalf is in accordance with the regulations of the Air Force at that time and is in accordance with current regulations of the Office of Personnel Management, detailed *infra*, which, under the majority view are void. In my view the regulations not only correctly implement the statute, but it would be contrary to basic fairness if the force of the Government is brought to bear on the side of one party to an essentially private dispute. In-

deed, it would entirely defeat the objective of the garnishment statute which is to remove persons from public assistance, if the Government must attempt to defeat the claims of dependent children and spouses, who are the only persons who can garnish federal wages.

Turning to Colonel Morton's "substantial claim," I can find no more in the record than a bald assertion that the support judgment was no good. The fact that he did not actually live in Alabama, and that Mrs. Morton so stated in the divorce papers, does not resolve the issue of jurisdiction of the Alabama courts. On the facts here, in my view, the support judgment was valid *ab initio*, but even if void, it was the basis for a valid judgment against the Government until set aside. In no event can the voidness of the underlying judgment be used as a sword against the Government.

What the majority wholly fails to appreciate is that 42 U.S.C. § 659(f) is designed not only to protect the Government itself from a claim like Colonel Morton's, but also to shield individuals who serve as disbursing officers. The record indicates that Colonel Morton has threatened individual Government officers with suit for their actions. The majority, by its interpretation of the statute injecting Fifth Amendment rights of due process, places a seal of approval on such *Bivens* claims.¹¹ The majority myopically looks only at protecting Colonel Morton, who is the only interested party whose rights remain fully protected if 42 U.S.C. § 659(f) is upheld by its terms. By its restrictive reading of 42 U.S.C. § 659(f), the majority destroys its intended purposes.

Also, contrary to the majority view, the rule of this case places an enormous administrative burden on all agencies of the Government. All regulations must be revised to conform to this decision. The majority's test of "notice of substantial irregularity" means no more,

¹¹ *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971); See also *Butz v. Economou*, 438 U.S. 478 (1978).

on the basis of the facts here, than that an employee must tell his pay officer or supervisor that he was not domiciled in the state asserting jurisdiction over him. Colonel Morton did no more than that, and his "supporting" evidence, a letter from his attorney advising him to *change his domicile from Alabama*, negated his claim. *No other "facts" relied on by the majority were even known until the trial.* The undercurrent in the opinion is that the Government owes a special duty to military personnel.¹² However, *all* employees of the Government are subject to garnishment of wages and a privileged class cannot be recognized within the confines of 42 U.S.C. § 659 (f).

The regulations of the Office of Personnel Management [5 C.F.R. § 581.101 *et seq.* (1981)], too lengthy to quote in their entirety, are based on the interpretation of the statute and understanding of the Government's responsibilities previously given by all other administrative and judicial authorities. No provision is made for defending a suit for an employee or looking behind facial validity on penalty of double liability. For example, § 581.302 entitled "Notification of Obligor" provides:

(a) As soon as possible, but not later than fifteen (15) calendar days after the date of valid service of legal process, the agent designated to accept legal process shall send to the obligor, at his or her duty station or last known home address, written notice:

.

(2) Of the maximum garnishment limitations set forth in § 581.402, with a request that the obligor submit supporting affidavits or other documentation necessary for determining the applicable percentage limitation;

.

¹² The majority's emphasis on what Colonel Morton said he was told by military legal advisors confirms that the majority has recognized a tort claim not a pay claim.

(4) Of the percentage that would be deducted if he/she fails to submit the documentation necessary to enable the governmental entity to respond to the legal process within the time limits set forth in § 581.303.

(b) The governmental entity may provide the obligor with the following additional information:

(1) Copies of any other documents submitted in support of the legal process:

(2) That the United States does not represent the interests of the obligor in the pending legal proceedings:

(3) That the obligor may wish to consult legal counsel regarding defenses to the legal process that he or she may wish to assert; and

(4) That obligors in the uniformed services may avail themselves of the protections provided in sections 520, 521, and 523 of the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U.S. Code App. 501 et seq.).

§ 581.305(a) provides:

(a) The governmental entity shall comply with legal process, except where the process cannot be complied with because:

(1) It does not, on its face, conform to the laws of the jurisdiction from which it was issued;

.

(6) Where notice is received that the obligor has appealed the underlying alimony and/or child support order, payment of moneys subject to the legal process shall be suspended until the governmental entity is ordered by a court, or other authority, to resume payments. However, no suspension action shall be taken where the applicable law of the jurisdiction wherein the appeal is filed requires com-

pliance with the legal process while an appeal is pending.

On facts virtually identical to those here, but with the further development that the state garnishment order was subsequently set aside, the Comptroller General of the United States rendered an opinion giving the following interpretation to the provisions of 42 U.S.C. § 659(f) :

As is indicated above, when the Air Force received the garnishment order, they reviewed it and found it valid on its face and in conformity with the Florida law. Sergeant Mathews has not shown that that finding was incorrect. Instead, he argued that the order was invalid because it was obtained by fraud, and that he had not been properly served *in the original court action against him*. As the Air Force advised him, these were matters for him to litigate in the courts and not for the Air Force to decide. That is, they were not challenges to the *facial validity of the garnishment order*. While the order was set aside in 1980, it was valid at the time payment was being made under it, and the Government had a duty to comply with it until the court modified it. There is no authority for reimbursement of the amounts withheld from Sergeant Mathews' pay, nor is there authority to reimburse him for the legal and other expenses he claims he incurred in having the order overturned.

Accordingly, the disallowance of the claim is sustained.

In the Matter of Technical Sergeant Harry E. Mathews, U.S.A.F., File No. B-203668 (Comp. Gen. Feb. 2, 1982) (emphasis added).

By failing to give any consideration to the administrative interpretation, the majority invites reversal by the Supreme Court. As stated by the Supreme Court recently in reversing the Court of Claims in another pay case, *United States v. Clark*, 454 U.S. 555, 565 (1982) :

Although not determinative, the construction of a statute by those charged with its administration is entitled to great deference, particularly when that interpretation has been followed consistently over a long period of time.

To the same effect is the statement in *United States v. Hopkins*, 427 U.S. 123, 127 (1976) (*per curiam*):

[W]e think that the Court of Claims gave insufficient attention to applicable administrative regulations when it undertook to decide the question.

It must also be added that the administrative interpretation ignored here has had the blessing of the other circuits.

In *Jizmerjian v. Dept of Air Force*, 457 F. Supp. 820 (D.S.C. 1978), *aff'd*, 607 F. 2d 1001 (4th Cir. 1979), *cert. denied*, 444 U.S. 1082 (1980), in an action for retirement pay paid by the Government pursuant to garrisonment in Arizona, the court questioned the basis for the exercise of jurisdiction over the judgment-debtor in the principal action but dismissed the suit against the Government on the basis of sovereign immunity as set forth in 42 U.S.C. § 659(f). The Arizona decree, like the Alabama decree here, stated no precise basis for jurisdiction and the ensuing contempt decree stated only that the Arizona court had "jurisdiction over the subject matter and the persons." *Id.* at 823. The *Jizmerjian* court, nevertheless held:

Notwithstanding the able and articulate citation of authority in plaintiff's brief in opposition to defendant's motion [for summary judgment], this court is persuaded that 42 U.S.C. § 659(f) insulates the United States from this suit.

Id. at 824.

In *Overman v. United States*, 563 F.2d 1287, 1291 (8th Cir. 1977), the Eighth Circuit, construing 42 U.S.C. § 659(f), similarly held that the judgment-debtor could

not enjoin the Government from honoring the garnishment of his wages, stating: "Clearly, the defense of sovereign immunity applies here."

The majority decision will create chaos in how the Government must operate in the thousands of garnishments it faces daily. It must either pay twice, or where permitted by a state court, litigate for any employee who raises a "substantial claim of jurisdictional irregularity" regardless of the regularity of the process "on its face."

I would give 42 U.S.C. § 659(f) the same interpretation as the Comptroller General and the above courts. Given the various forms which a garnishment process can take and that garnishment may not even come from the court that entered the basic judgment, any other interpretation creates impossible administrative burdens. No more is required than that whatever process is served on the Government, the papers must be facially regular and be issued by a court with garnishment jurisdiction. There is no question here but that all process served on the Government was regular and came from the proper court under Alabama law. No violation of any regulation occurred. The statute by its terms provides immunity to the sovereign and its employees.

IV

Comity and Federalism

Suits against the Government resulting from garnishment of federal pay have taken many forms, but uniformly the result has been dismissal from the federal courts. The common theme found in each of these cases is that the federal court must defer to state remedies and procedures and not intrude into matters primarily of state interest.¹³

¹³ In any collateral relief from a judgment, which is what Colonel Morton seeks here, comity must be considered. (See Restatement (Second) of Judgments § 79 (1982).) Comity has even greater significance between state and federal courts.

The Eighth Circuit in *Overman v. United States*, 563 F.2d at 1292-93, succinctly defined the appropriate relationship between federal and state courts:

There is, and ought to be, a continuing federal policy to avoid handling domestic relations cases in federal court in the absence of important concerns of a constitutional dimension. *See, e.g., Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383, 50 S.Ct. 154, 74 L.Ed. 489 (1930); *In re Burrus*, 136 U.S. 586, 593-94, 10 S.Ct. 850, 34 L.Ed. 500 (1890); *Hernstadt v. Hernstadt*, 373 F.2d 316 (2d Cir. 1967). Such cases touch state law and policy in a deep and sensitive manner, and "[a]s a matter of policy and comity, these local problems should be decided in state courts." *Buechold v. Ortis*, *supra*, 401 F.2d at 373. This court will not lightly presume that Congress, when enacting § 659, meant for the federal courts to take over the entire domain of domestic relations law applicable to federal employees.⁶ Moreover, we will not readily infer that Congress intended to permit federal agencies to be dragged in as defendants by any federal employee or spouse of an employee who, unhappy with a prior state adjudication, seeks to contest it by suing the Government over wage garnishment rather than challenging the divorce decree in an appropriate state forum.

⁶ The federal courts have uniformly rejected jurisdiction of garnishment proceedings whether the federal defendants have sought removal or action has been commenced initially in federal court. *Wilhelm v. United States Dept. of Air Force Accounting*, 418 F. Supp. 162 (S.D. Tex. 1976); *Popple v. United States*, 416 F. Supp. 1227 (W.D. N.Y. 1976); *Golightly v. Golightly*, 410 F. Supp. 861 (D. Neb. 1976); *Morrison v. Morrison*, 408 F. Supp. 315 (N.D. Tex. 1976); *West v. West*, 492 F. Supp. 1189 (N.D. Ga. 1975); *Bolling v. Howland*, 398 F. Supp. 1313 (M.D. Tenn. 1975).

In *Cunningham v. Department of Navy*, 455 F. Supp. 1370 (D. Conn. 1978), the Connecticut district court dis-

missed an action to enjoin the garnishment of the plaintiff's Navy retirement pay pursuant to garnishment proceedings in a New York court on a Virginia divorce decree. The plaintiff resided in Connecticut and had never resided in New York. He attacked the exercise of *in personam* jurisdiction over him by the New York court in rendering the judgment against him on which the garnishment order to the Navy was based. The court expressed doubt about the constitutionality of the New York long-arm statute as applied to Mr. Cunningham, but concluded that it was without power to consider plaintiff's collateral attack on the New York judgment.¹⁴ Noting the deep concerns with respect to comity expressed in *Overman*, and by the Supreme Court in *Sosna v. Iowa*, 419 U.S. 393 (1975), the *Cunningham* court held:

Similar considerations should apply in the case at bar. Although plaintiff insists that his only claim is against an agency of the federal government, his extensive briefing on the New York matrimonial long-arm statute, his vehement argument regarding his non-liability for an alimony arrearage, and his documenting of his ex-wife's allegedly unconscionable behavior before the New York court belie the narrowness of his claim. He implicates domestic relations policies which are more properly within the interest of the two states involved—either New York or Virginia.

455 F. Supp. at 1372.

Other courts agree. In *West v. West*, 402 F. Supp. at 1192, the court stated:

¹⁴ The majority incorrectly states that the plaintiff in *Cunningham* did not attack lack of personal jurisdiction. This is precisely what he did attack in arguing that the *in personam* jurisdiction exercised by the New York court was unconstitutional. Colonel Morton makes the identical attack here.

At this point, the only question which would arise in the case would concern the basis of the garnishment, a domestic relations type of issue not appropriate for resolution by this court. See *Barber v. Barber*, 62 U.S. (21 How.) 582, 16 L.Ed. 226 (1859).

In *Jizmerjian v. Dept. Of Air Force*, 457 F. Supp. at 824, the court advised:

[H]is only possible successful method of attack on the Arizona alimony decree must take place in the Arizona state courts.

In *Popple v. United States*, 416 F. Supp. at 1228, the district court similarly deferred to the state:

Plaintiff's real argument is that § 659 does not give a state court jurisdiction over an individual not resident in that state. This argument would properly be made in the state court that purported to garnish wages of an individual not resident in that state.

In *Garrett v. Hoffman, supra*, Judge Luongo construed 28 U.S.C. § 2283 (1970)¹⁵ as precluding federal court action under similar circumstances:

A litigant may not defeat the policy underlying § 2283—the avoidance of “needless friction between state and federal courts”—by framing the action as one for a declaratory judgment rather than as one

¹⁵ § 2283. Stay of State court proceedings

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

See *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 287 (1970) (“It is settled that the prohibition of § 2283 cannot be evaded by addressing the order to the parties or prohibiting utilization of the results of a completed state proceeding.”).

for an injunction. *E.g.*, *Dresser Indus., Inc. v. Insurance Co. of North America*, 358 F. Supp. 327, 330 (N.D. Tex. 1973); *Brooks v. Briley*, 274 F. Supp. 538, 558 (M.D. Tenn. 1967) (alternative holding) (three-judge court), *aff'd per curiam*, 391 U.S. 361, 88 S.Ct. 1671, 20 L.Ed.2d 647 (1968); *Rockefeller v. First Nat'l Bank*, 154 F. Supp. 122, 125 (S.D. Ga. 1957); C. Wright, *Federal Courts* § 47, at 204-05 (3d ed. 1976).

The federal defendants here argue that this action "is in essence an attempt by plaintiff to invalidate and enjoin enforcement of the Florida judgment by resort to federal court." . . . Plaintiff . . . asserts, this lawsuit challenges only "the Federal defendants' actions in failing to pay the plaintiff retired pay to which he is entitled." . . . I cannot accept plaintiff's contention. An examination of the relief requested in his complaint makes it abundantly clear that plaintiff is ultimately attacking the Florida court's writs of garnishment.

441 F. Supp. 1156-57 (footnotes omitted). In *Wilhelm v. U.S. Dept of Air Force Accounting*, 418 F. Supp. 162 (S.D. Tex. 1976), the court similarly deferred to the state, in declining to accept removal from the Texas courts at the behest of the Government, stating:

The Court has concluded that no policy or purpose will be served by construing § 1442(a)(1) in the present context to permit the removal of these domestic relations disputes to federal court. A broader construction of this provision would effect a profound alteration in the relationship between federal and state courts.

Id. at 166.

No sound policy warrants the friction the majority creates not only with Alabama, but with all other state jurisdictions. In my view, the majority is in clear conflict with the decision of the Supreme Court in *Trainor*

v. *Hernandez*, 431 U.S. 434 (1977), involving a constitutional challenge to the Illinois attachment statute. In dismissing the federal action, the court raised again the vital consideration "that in a Union where both the States and Federal Government are sovereign entities, there are *basic concerns of federalism* which counsel against interference by federal courts, through injunctions or otherwise, with legitimate state functions, *particularly with the operation of state courts.*" *Id.* at 441 (emphasis added). That concern is not found in the majority decision.¹⁶

The majority opinion would lead one to believe that the support judgment was not a considered judgment of the court. The majority refers to it as "a judgment by default." A default in the case was entered by the clerk. However, before the *judgment* in the case was given, Mrs. Morton was required to appear before the court to establish her entitlement to a money judgment. The decree in this case specifically states that "testimony" was given by Mrs. Morton. To obtain service by mail on her husband Mrs. Morton had correctly stated that he was a nonresident. The majority assumes that the Alabama court was either incompetent or ignored the fact of his non-residence in deciding that Mrs. Morton was entitled to a monetary award. *Lightell v. Lightell*, 394 So.2d 41 (Ala. Civ. App. 1981), cited by the majority, belies the inference that Alabama courts are little concerned with jurisdictional questions.

V

Jurisdiction of Alabama Court

The majority upholds the trial court's conclusion that Colonel Morton did not have sufficient contact with Alabama to bring him within the jurisdiction of its courts.

¹⁶ Prior decisions of the U.S. Court of Claims have adhered to that principle. *Gunston v. United States*, 602 F.2d 316, 319 n.4 (Ct. Cl. 1979).

There can be no dispute that, as the plaintiff, Colonel Morton would have the burden of proof of facts supporting that legal conclusion. The facts stated in the majority opinion in his favor have been given a gloss they do not deserve. Indeed, the record lacks vitality due to the absence of the most knowledgeable adversary, Mrs. Morton.¹⁷ The record consists solely of answers to interrogatories and affidavits. There has in no sense been the kind of trial where facts are developed through testimony of witnesses subject to cross-examination. Moreover, the Government has no personal knowledge with which to counter Colonel Morton's self-serving statements.

However, even on this bland record, one can find no basic unfairness under the standards of *Kulko v. Superior Court of California*, *supra*, in the exercise of jurisdiction by the Alabama court since Colonel Morton had purposely availed himself "of the privilege of conducting activities within the forum State, invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235 (1958).

In 1974, the year in which Colonel Morton was served in the divorce proceedings, he was paying taxes to the state of Alabama and claiming Alabama as his permanent place of residence, not only on Air Force forms, but on his 1973 and 1974 federal tax returns (filed 1974 and 1975), where a deduction could have been taken for Alabama taxes. That in itself should be enough. By invoking the state's taxing authority Colonel Morton clearly sought "the benefits and protections of its law."

¹⁷ If this were legally a pay claim, rather than a negligence or breach of fiduciary duty claim, Mrs. Morton and the dependent child would be indispensable parties. There is only one claim to pay and there are conflicting claimants. *Hanson v. Denckla*, 357 U.S. 235 (1958). The majority has determined that adverse claimants have no rights without notice or an opportunity to be heard. Moreover, the Alabama court may continue to order payments under garnishment since the parties to that litigation are not bound by the judgment in this case.

Whether payment in Alabama also reduced his liability for taxes in Virginia, where he had to file as an actual resident, we do not know. None of his returns are in the record despite the request of the trial judge for these documents.

Moreover, he had used the state of Alabama in other ways over the years in addition to those mentioned by the majority. He registered one or more cars in Alabama after he had left the state. It is also apparent that Colonel Morton sought to invoke the law and courts of Alabama. On September 15, 1973, in anticipation of separation, Colonel Morton and his wife entered into a separation agreement. At that time they were residing in Virginia. It is apparent from this agreement that the parties contemplated that, if divorce proceedings were instituted, Alabama courts would be used.¹⁸ He moved his wife and children to Alabama at Government expense by asserting it was *his* permanent residence. At that time, he avers, he hoped for a reconciliation.

After the Alabama court awarded the judgment for alimony and child support in the same amounts as he had been paying,¹⁹ Colonel Morton continued to make payments to Mrs. Morton until December 1976, specifying on his check: "for divorce," "for child support," or simply the number of the payment since the separation agreement. His action indicates that he was generally satisfied with the decree and waived any objection to lack of personal jurisdiction which in itself is ground for finding the decree to be valid. Restatement, (Second) of Judgments §§ 5 and 61 (1982). He married Ronnette

¹⁸ The settlement agreement incorporated the particular grounds for divorce provided under Alabama law and was to serve as the basis for division of property, alimony and child support, if the parties were divorced on such grounds.

¹⁹ Morton had been paying \$500 a month under the settlement agreement then in effect since September 1973. The decree imposed no greater burden than he had agreed to.

Dreves in October 1975 in reliance on the Alabama divorce.

During the pendency of the divorce proceedings in Alabama (August 1974-August 1975), the parties were actively litigating the settlement agreement in Virginia from July 1974 until June 10, 1976. A letter from his attorney, whom the majority nevertheless treats as uninformed, advised him in August 1976 to change his domicile *from* Alabama.

Whether Colonel Morton intended to make, or made, Alaska his permanent domicile from the moment he transferred there in May 1974 is not proved by credible evidence²⁰ nor, in any event, of controlling significance. Accepting his statement of intent as true cannot overcome the facts of his relationship with Alabama which he asserted as a taxpayer for the entirety of 1974. He was, accordingly, subject to the jurisdiction of the Alabama court in 1974 and to service by mail, since he could not be physically served there, as permitted by the Alabama court.

VI

In view of the foregoing, I would reverse the judgment of the Claims Court.

²⁰ He did not pay taxes in Alaska until 1976 (for 1975) and he moved from there in 1977.

APPENDIX

CODE OF ALABAMA—1975

ARTICLE 9.

GARNISHMENTS.

§ 6-6-370. "Garnishment" defined.

A "garnishment," as employed in this article, is process to reach and subject money or effects of a defendant . . . , in a judgment . . . in the possession or under the control of a third person, . . . ; and such third person is called the garnishee.

* * * * *

§ 6-6-390. When process of garnishment obtainable.

The plaintiff . . . in any judgment on which execution can issue may obtain process of garnishment as defined in section 6-6-370

§ 6-6-391. Affidavit of amount due plaintiff.

To obtain such writ of garnishment, the plaintiff, his agent or attorney must make, before an officer authorized to administer oaths, and file, with the clerk of the court in which . . . the judgment was entered, an affidavit stating the amount due from the defendant to the plaintiff, . . . that process of garnishment is believed to be necessary to obtain satisfaction thereof and that the person to be summoned as garnishee is believed to be chargeable as garnishee in the case. . . .

* * * * *

§ 6-6-393. Issuance and service of process.

Upon the filing of the affidavit . . . , the officer filing the same must issue process of garnishment and a copy thereof for each garnishee, to be served by the proper

officer, requiring the garnishee to appear within 30 days and file an answer, upon oath, whether, at the time of the service of the garnishment, at the time of making his answer or at any time intervening between the time of serving the garnishment and making the answer he was indebted to the defendant and whether he will not be indebted in future to him by a contract then existing, whether by a contract then existing he is liable to him for the delivery of personal property or for the payment of money which may be discharged by the delivery of personal property or which is payable in personal property and whether he has not in his possession or under his control money of effects belonging to the defendant.

* * * * *

§ 6-6-430. Filing of bond; discharge of money or property from garnishment; proceedings as if bond not executed; judgment; discharge of garnishee.

(a) When garnishment has been issued . . . upon a judgment, the defendant may make and file with the issuing the garnishment bond in such sum as the judge or clerk issuing the garnishment bond in such sum as the judge or clerk may prescribe, not exceeding twice the amount of the plaintiff's demand, payable to the plaintiff, with sufficiency surety, to be approved by such judge or clerk, conditioned to pay the amount for which the garnishee may be found indebted or liable to the defendant and the cost of the garnishment. Thereupon, the money or property in the hands of the garnishee is discharged from the garnishment and the garnishee relieved of all liability therefor to the plaintiff; but the garnishee must answer, and, except as is otherwise provided in this article, the case must proceed and be determined as if such bond had not been executed.

* * * * *

(c) The garnishee is not discharged from liability to the defendant until he has paid the debt or satisfied the demand the garnishment was intended to reach.

* * * * *

§ 6-6-450. Filing of answer; notice thereof; oral examination.

The garnishee must answer under oath according to the terms of the garnishment; and, upon filing, the clerk or register shall give the plaintiff and defendant notice. . . .

.

§ 6-6-452. Payment of defendant's money into court if garnishee admits possession thereof.

If the garnishee admits the possession of money belonging to the defendant, he must pay the same or so much thereof as may be necessary to satisfy the plaintiff's demand and costs into court to await the order of the court; and, if he fails to make such payment, he is liable as if he had admitted an indebtedness for the amount of such money.

§ 6-6-453. Payment of indebtedness or liability to clerk; effect thereof; ordering of deposit by court.

(a) When the garnishee admits indebtedness or liability to the defendant and the defendant has not executed bond for the dissolution of the garnishment, as provided in division 4 of this article, the garnishee may, by order of the court first had and obtained, pay the amount of such indebtedness or liability or so much thereof as the court may direct into the hands of the clerk, to be held subject to the judgment in the case. Such payment has the effect to discharge the garnishee from liability for the amount so paid and interest subsequently accruing thereon

.

§ 6-6-454. Judgment where answer admits indebtedness to defendant.

If the garnishee answers and admits indebtedness to the defendant, judgment thereon must be entered against him, . . . for the amount so admitted, if less than the

amount of the judgment against the defendant, or, if more or equal thereto, for the amount thereof

.

§ 6-6-457. Proceedings on failure to appear and answer.

If the garnishee fails to appear and answer, a conditional judgment must be entered against him for the amount of the plaintiff's claim, as ascertained by his judgment, to be made absolute unless he appears within 30 days after notice of the conditional judgment issued by the clerk, to be served on him, as other process, by the sheriff. If he fails to appear within the time required by the notice served upon him or if two notices are returned "not found" by the sheriff of the county in which the garnishment was executed, the judgment must be made absolute.

.

§ 6-6-459. Contest of answer by defendant.

The defendant, upon the coming in of the answer, may, within 30 days after notice of the filing of the answer, allege that the garnishee is indebted to him in a larger sum than he has admitted, is otherwise liable to him on a demand, the subject of garnishment, or that he holds money or effects of the defendant not admitted in his answer, which, being reduced to writing setting forth particularly in what respect the answer is deficient and being sworn to, an issue must thereupon be made up, under the direction of the court, which must be tried by a jury if required by either party; but such controversy shall not prevent the plaintiff from taking judgment upon the answer of the garnishee.

.

§ 6-6-461. Effect of judgment for plaintiff as between garnishee and defendant.

The judgment condemning the debt, demand, money or effects to the satisfaction of the plaintiff's demand is con-

clusive as between the garnishee and the defendant to the extent of such judgment, unless the defendant prosecutes to effect an appeal from such judgment, which he may do in his own name; and, if such judgment is stayed by bond and the garnishee is notified of the fact, he is not permitted to discharge such judgment pending the appeal.

* * * * *

§ 6-6-463. Disposition of claims of other persons suggested by garnishee.

* * * * *

(e) The interposition of these collateral issues [i.e., third party claimants] does not affect the jurisdiction of the court obtained by . . . service of garnishment.

* * * * *

§ 6-6-464. Appeals.

An appeal lies to the supreme court or the court of civil appeals, as the case may be, at the instance of the plaintiff, the defendant, the garnishee or the contestant or claimant.

61a

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 290-77

ALLAN WAYNE MORTON, APPELLEE

v.

THE UNITED STATES, APPELLANT

ORDER

A suggestion for rehearing en banc and a petition for reconsideration having been filed in this case,

UPON CONSIDERATION THEREOF, it is Ordered by the court that the suggestion for rehearing en banc and the petition be, and the same are hereby, Denied.

FOR THE COURT:

/s/ George A. Hutchinson
Clerk

Date—July 5, 1983

APPENDIX C

IN THE UNITED STATES COURT OF CLAIMS

TRIAL DIVISION

No. 290-77

(Filed December 14, 1981)

ALLAN WAYNE MORTON

v.

THE UNITED STATES

Military pay; garnishment; domicile; "minimum contacts"; jurisdiction of state court; legal process.

OPINION *

WHITE, *Senior Trial Judge*: In the petition, as amended, Allan Wayne Morton, a colonel in the U.S. Air Force and usually referred to hereafter in the opinion as "the plaintiff" or as "Colonel Morton," seeks to recover \$18,136.54, representing amounts which the United States Air Force allegedly deducted from his pay as a commissioned officer on active duty and paid over to the Circuit Court for the Tenth Judicial Circuit of Alabama pursuant

* The trial judge's recommended decision and conclusion of law are submitted in accordance with Rule 134(h).

to writs of garnishment issued by that court. The writs of garnishment were ancillary to a decree for divorce, alimony, and child support, which the Alabama court entered in a case filed against Colonel Morton by his then wife, Patricia Kay Morton.

The plaintiff and Patricia Kay Morton were married in 1954 and separated in September 1973. At the time of the separation, the Mortons had two minor sons, one about 16½ years old and the other almost 13 years old.

During the 4-year period immediately preceding their separation, the Mortons and their two minor sons lived in a home which they had purchased in Loudoun County, Virginia. One important factor in the separation was that the plaintiff was notified in August 1973 that his next Air Force assignment would be in the State of Alaska, and Patricia Kay Morton was unwilling to accompany the plaintiff to Alaska.

On September 15, 1973, the plaintiff and Patricia Kay Morton, in anticipation of their imminent separation, signed a document entitled "Separation Agreement." This agreement provided that the real and personal property which the couple had accumulated was to be divided between them in a specified manner, with the plaintiff receiving the Loudoun County house and paying off the mortgage; that Patricia Kay Morton was to have the sole custody and control of the two minor sons, with the plaintiff to have reasonable visitation rights; and that the plaintiff was to pay Patricia Kay Morton, as separate maintenance payments that were to include support for both children, the sum of \$500 per month for 30 months and, thereafter, \$200 per month for 33 months. The settlement agreement also contained the following provision (among others):

* * * Any decree entered in any action for divorce which may be requested by either party shall be agreed to by the other party and shall be consistent

with the terms of this agreement and the court is requested to include this agreement in the decree.

* * *

On or about September 16, 1973, the plaintiff and Patricia Kay Morton separated. Patricia Kay Morton and the two young sons moved to Alabama, where she and the plaintiff had married and had lived for the first 3 years of their married life. The plaintiff remained in the Loudoun County house until May 1974, when he moved to Alaska pursuant to the Air Force assignment previously mentioned.

The separation agreement of September 15, 1973, was later involved in a suit for specific performance which the plaintiff filed (through counsel) in July 1974 against Patricia Kay Morton in the Circuit Court of Loudoun County, Virginia. The filing of the suit was triggered by Patricia Kay Morton's refusal to sign the deed conveying the Loudoun County house to the purchasers with whom the plaintiff had contracted to sell the house. (Under the separation agreement, the house was to be the property of the plaintiff.) In a decree which the Loudoun County court entered on March 25, 1976, following a trial, the separation agreement of September 15, 1973, was set aside, cancelled, and annulled. The plaintiff thereupon gave notice of appeal to the Supreme Court of Virginia. During the pendency of the appeal, the plaintiff and Patricia Kay Morton settled all matters involved in the Virginia case, including the setting aside of the separation agreement. Pursuant to this settlement Patricia Kay Morton received \$12,500 in cash from the sale of the Loudoun County house, and she was permitted to keep all the property (furniture, china, silver, crystal, other valuables collected by the Mortons over the years, and an automobile) which she had taken with her when she moved to Alabama from Virginia in September 1973. In view of the settlement, the Circuit Court of

Loudoun County entered a final decree on June 10, 1976, dismissing the cause.

In addition to paying Patricia Kay Morton the sum of \$12,500 in settlement of the Virginia litigation, the plaintiff voluntarily continued to make child support payments, as he felt a moral obligation to do so. These child support payments were at the rate of \$500 per month until the older child became 18 years of age, and then at the reduced rate of \$250 a month for the younger child, until Patricia Kay Morton began garnishing the plaintiff's pay under circumstances described hereafter.

On August 28, 1974 (during the pendency of the case in Loudon County, Virginia), Patricia Kay Morton filed suit in the Circuit Court for the Tenth Judicial Circuit of Alabama against Colonel Morton for divorce, for the custody of the two minor children, together with support and maintenance for the children, and for alimony.

Suit papers in the Alabama divorce proceeding were sent by registered mail to Colonel Morton in Alaska. He received them on September 17, 1974. No personal service was made on Colonel Morton at any time or at any place in connection with the Alabama divorce suit.

Colonel Morton did not make an appearance at any time in the Alabama divorce suit.

Colonel Morton having failed, within the time permitted, to plead or otherwise defend the suit, judgment by default was entered against him on August 14, 1975, by the Circuit Court for the Tenth Judicial Circuit of Alabama. The judgment granted Patricia Kay Morton a divorce from Colonel Morton, it awarded to her the custody of the two children, and it ordered Colonel Morton to pay to Patricia Kay Morton the sum of \$500 each month "as alimony for * * * [Patricia Kay Morton] and partial support and maintenance of the * * * minor children." (As of August 14, 1975, the older son was already past the age of 18.)

On December 27, 1976, the Air Force Finance Officer received by certified mail a writ of garnishment which

had been issued by the Register of the Circuit Court for the Tenth Judicial Circuit of Alabama as ancillary to the decree of August 14, 1975. The writ sought to garnish pay of the plaintiff in the amount of \$4,100. It was accompanied by a copy of the judgment in the Alabama divorce case, which recited that Colonel Morton was to pay \$500 per month to Patricia Kay Morton "as alimony for * * * [Patricia Kay Morton] and partial support and maintenance for the * * * minor children." The writ was also accompanied by an affidavit executed by Patricia Kay Morton, stating that the sum of \$4,100 was due and owing "for ailmony and child support" under the judgment dated August 14, 1975. (As of December 27, 1976, when these papers were received by the Air Force Finance Office, the older Morton son was not only past the age of 18, but he was also married.).

The Air Force promptly notified the plaintiff regarding the receipt of the writ of garnishment. The plaintiff took the position before the Finance Office—on the advice of an attorney in the Judge Advocate's Office—that the decree of the Alabama court ordering him to pay alimony and child support was void for lack of jurisdiction, as he was neither domiciled nor a resident of Alabama and he was never properly served or notified of the Alabama divorce proceeding. He also informed the Finance Office that he had paid all of his obligations to Patricia Kay Morton.

As the writ of garnishment was issued on the regular form used by the Alabama courts, the Air Force Finance Office honored the writ of garnishment despite the plaintiff's protest, made deductions from the plaintiff's pay, and paid \$4,100 over to the Circuit Court for the Tenth Judicial District of Alabama. It appears that the Finance Office did not seek advice from the Judge Advocate General's Office, which is the law office of the Air Force.

Subsequently, the Air Force Finance Office received additional writs of garnishment from the Circuit Court for the Tenth Judicial Circuit of Alabama. These writs,

which were also on the regular form used by the Alabama courts, sought to garnish additional pay of the plaintiff. The evidence in the record does not show whether—and, if so, when—the plaintiff was notified of the receipt of these writs. Although the plaintiff, in connection with the December 27, 1976, writ of garnishment, had informed the Finance Office that the Alabama Court did not have jurisdiction to enter a judgment against him for alimony and child support, the Finance Office honored the writs of garnishment referred to in this paragraph, made deductions from the plaintiff's pay, and paid the money over to the Circuit Court for the Tenth Judicial District of Alabama. All of these writs were honored after the older Morton son was past the age of 18 and was married, and some of the money was deducted from the plaintiff's pay and paid over to the Alabama court after the younger son was past the age of 18.

The present action was subsequently filed by the plaintiff to recover the money thus garnished.

The plaintiff and the defendant sought to dispose of this action by filing cross-motions for summary judgment. Both motions were denied by the court, without prejudice to either party, in an order dated May 19, 1978. The court stated (in part) that on the basis of the materials submitted in connection with the motions, it could not say whether or not the Alabama court had jurisdiction to enter a money judgment against the present plaintiff for alimony and child support, or whether the legal process served on the United States on behalf of Patricia Kay Morton was regular on its face.

The court remanded the case to the trial division; and indicated that the initial task would be to develop the facts with respect to two issues:

First, whether the plaintiff was a domiciliary of the State of Alabama when Patricia Kay Morton filed her divorce action in August 1974.

Second, whether the Circuit Court for the Tenth Judicial Circuit of Alabama relied upon and merged the sep-

aration agreement of September 15, 1973, into the final divorce decree when the Alabama court granted the award of \$500 per month to Patricia Kay Morton for alimony and child support.

The two issues will be discussed in reverse order.

The Merger Issue

The evidence in the record clearly shows that the separation agreement of September 15, 1973, between Colonel Morton and Patricia Kay Morton was not introduced before the Circuit Court for the Tenth Judicial Circuit of Alabama and was not made a part of the record in the divorce case which Patricia Kay Morton filed against Colonel Morton.

Accordingly, the separation agreement was not relied upon and merged into the final divorce decree when the Alabama court granted to Patricia Kay Morton the award of \$500 per month for alimony and child support.

The Domicile Issue

The essential elements of domicile are residence in fact, coupled with the purpose to make the place of residence one's home. *Texas v. Florida*, 306 U.S. 398, 424 (1939). As the plaintiff was born in the State of Alabama on April 15, 1934, and lived there continuously until July 1957, it is obvious that the plaintiff was domiciled in Alabama for the first 23 years of his life, at least.

Also, it must be borne in mind that, once acquired, a person's domicile continues until a new one is acquired. *Desmare v. United States*, 93 U.S. 605, 610 (1876).

The plaintiff contends, however, that Alabama was no longer his domicile during the period between August 28, 1974, when Patricia Kay Morton filed suit against him in Alabama for divorce, for child custody and support, and for alimony, and August 14, 1975, when the Alabama court entered judgment by default against him in the divorce case.

The plaintiff moved from Alabama in July 1957 because he had entered the U.S. Air Force and had been assigned to Warner Robins, Georgia. He and Patricia Kay Morton and their older son, who was only a few months old at the time, moved to Georgia in July 1957; and they lived there together as a family until 1960.

When the plaintiff entered the Air Force and moved from Alabama to Georgia, he intended never to return to Alabama again to live. On the other hand, the plaintiff did not have any intention at the time of making Georgia his permanent home. It was the plaintiff's intention at that time to establish a domicile in Florida, and eventually to retire to Florida at the end of his military service. The plaintiff subsequently made efforts to obtain Air Force assignments to bases in Florida, so that he could purchase a home there and establish his domicile in Florida, but his efforts in that direction were unsuccessful. The plaintiff never became a resident of Florida; and, therefore, despite his intention, he never became a domiciliary of that State because the essential element of residence in fact was lacking.

Pursuant to military assignments which the plaintiff received from the Air Force, he and his family moved to, and lived together in: Ohio from August 1960 to June 1961; in Georgia again from June 1961 to June 1963; in the Philippine Islands from June 1963 to June 1965; and in New York from June 1965 to June 1968.

The plaintiff was assigned to military duty in Vietnam in June of 1968, and he served there until June of 1969. While the plaintiff was serving in Vietnam, Patricia Kay Morton and the two Morton children lived in St. Petersburg, Florida.

When the plaintiff returned to the United States from Vietnam in 1969, he and Patricia Kay Morton bought their first home in Loudoun County, Virginia. They lived together there until Patricia Kay Morton left the plaintiff in September 1973 and moved back to Alabama, taking the Morton children with her. The plaintiff con-

tinued to live in the Virginia house until May of 1974, when he moved to Alaska.

Shortly before leaving for Alaska, the plaintiff entered into a contract for the sale of the Virginia house. It was Patricia Kay Morton's refusal to sign the deed conveying the Virginia house to the purchasers that led to the Virginia litigation, previously mentioned in the opinion, which the plaintiff instituted against Patricia Kay Morton for specific performance of the separation agreement dated September 15, 1973.

There is nothing in the evidence to indicate that, during the various periods when the plaintiff was living in Georgia (twice), in Ohio, in the Philippine Islands, in New York, in Vietnam, and in Virginia, the plaintiff ever intended to make any of these places his home. Consequently, as the essential element of intention was lacking, the plaintiff did not establish a new domicile in any of the localities just named. In view of this, it must necessarily be concluded that Alabama continued to be the State of the plaintiff's domicile despite his intention, on leaving Alabama in 1957, never to return to that State to live. As previously stated, once domicile is acquired in a locality by an individual, it continues until a new one is acquired. *Desmare v. United States, supra*, 93 U.S. at 610.

The plaintiff moved from Virginia to Alaska in May 1974 pursuant to a new Air Force assignment. Previously, in 1972 or earlier, the plaintiff had visited Alaska; and when he first saw that State, he changed his mind about establishing a domicile in Florida, because he knew that he wanted to make his permanent home in Alaska. As early as 1972, the plaintiff orally asked the Air Force for an assignment to Alaska, but he did not receive such an assignment at that time. In 1973, he again asked for an assignment to Alaska; and in accordance with this request, he received an assignment to Anchorage, Alaska, as of May 1974.

When the plaintiff moved to Alaska in May 1974, it was his intention to purchase a home in Alaska and to establish a domicile in that State. He made his intention known at the time to associates.

On June 1, 1974, shortly after the plaintiff arrived in Alaska, he entered into a contract to purchase a home for himself in Anchorage, Alaska.¹ The plaintiff continued to live in Alaska until 1977, when the Air Force transferred him to Andrews Air Force Base, Maryland.

A change in domicile requires physical presence at the new location, plus an intention on the part of the individual to make the new location his or her home, and the absence of any intention to have a home at a former domicile. *Stamer v. United States*, 148 Ct. Cl. 482, 490 (1960); cf. *Holmes v. Sopuch*, 639 F.2d 431, 433 (8th Cir. 1981). When these elements concur, the change in domicile is instantaneous. *Spurgeon v. Mission State Bank*, 151 F.2d 702, 705-06 (8th Cir.), cert. denied, 327 U.S. 782 (1945).

With respect to the plaintiff, the essential elements for acquiring a new domicile concurred when the plaintiff arrived in Alaska during the month of May 1974. From then until 1977, the plaintiff was an actual resident of Alaska, it was his intention to make Alaska his home, and he lacked any intention to have a home at a former domicile. Accordingly, it necessarily follows that the plaintiff was a domiciliary of Alaska, and not of Alabama, during the 1974-75 period when the divorce proceeding against him in Alabama was in progress.

Before concluding this part of the opinion, comments should be made on several points mentioned by the defendant in its brief as allegedly showing that the plaintiff was still a domiciliary of Alabama while the divorce proceeding against him was still in progress.

¹ It later became impossible for the plaintiff to consummate this contract because of financial difficulties attributable to the refusal of Patricia Kay Morton to sign the deed conveying the Virginia house to the purchasers.

1. The defendant calls attention to the fact that the plaintiff, on entering the military service in 1957, listed Birmingham, Alabama, as his "Home of Record."

In military parlance, the term "Home of Record" designates the State from which a member enters the military service. It is used for the purpose of fixing travel and transportation allowances. The "Home of Record" is not necessarily a member's State of legal residence or domicile.

The terms "legal residence" and "domicile" are used in the military service interchangeably to denote the place where a member has his or her permanent home, and to which, whenever the member is absent, he or she has the intention of returning. As indicated earlier in the opinion, after the plaintiff left Alabama in 1957, he never had any intention of returning to Alabama to live.

2. The defendant refers to the supposed listing by the plaintiff "of Alabama as his legal residence for tax purposes from 1965 to April 15, 1976 * * *."

Actually, it was the Air Force—and not the plaintiff—that listed Alabama as the plaintiff's legal residence for the payment of state income taxes. This was done without the plaintiff's consent and without checking with the plaintiff. Upon learning of this in June 1974, the plaintiff asked the Air Force Finance Office to correct the error by showing Alaska as the State to which state income taxes would be paid. The requested correction was not made, however, until April of 1976, after the plaintiff had been to the Finance Office three separate times and had, on three occasions, submitted a form to effect the change.

3. The defendant relies on evidence showing that the plaintiff paid state income taxes to Alabama for 1973 and 1974.

In 1973, when the plaintiff and Patricia Kay Morton separated, the plaintiff agreed to have Patricia Kay Morton's household goods moved to Alabama as a part of his military household goods move. It was his belief

that in order to do this, it was necessary that he file an Alabama income tax return for the year 1973; and, accordingly, in 1974 the plaintiff and Patricia Kay Morton filed a joint income tax return in Alabama for the year 1973. The Mortons also filed a state income tax return in Virginia for the year 1973, as they were both residents of that State for the greater part of the year and the plaintiff was a Virginia resident for the entire year.

The plaintiff also filed an income tax return in Alabama for the year 1974, as stated by the defendant. In that year, the plaintiff and Patricia Kay Morton were litigating in the Circuit Court of Loudoun County, Virginia, over the separation agreement of September 15, 1973, but they were still married. Patricia Kay Morton was employed in Alabama and receiving income in that State, while the plaintiff's 1974 income was received partially in Virginia and partially in Alaska. The ultimate outcome of the Virginia litigation was unknown. The plaintiff reasoned that if the Virginia court should set aside the separation agreement and he lost the tax break of a unitary award tax deduction, Patricia Kay Morton might agree to amend their separate income tax returns and to file income tax returns for 1974 jointly with the plaintiff, because they were still married and they would both benefit from such a joint filing. This did not happen, however.

The evidence shows that the plaintiff's actions in filing state income tax returns in Alabama for 1973 and 1974 were attributable to the exigencies of the situation in which he found himself due to the breakup of his marriage, and did not reflect any intention to make his home again in Alabama.

4. The defendant asserts that sometime after moving to Alaska, the plaintiff "expressed his intention to leave Alaska and again reside in Virginia * * *." This contention is based on a letter which plaintiff's counsel in the Virginia litigation wrote to him on December 17,

1975, concerning (among other things) plaintiff's house in Virginia, which had not yet been sold and was involved in the Virginia litigation. Plaintiff's counsel made the following statement (among others) in the letter:

* * * The last correspondence I had from you indicated that you were returning to the Washington area and wanted to live in the house yourself. You have an absolute right to do that. In fact, I was under the impression that you would have long since been back here.

This statement by plaintiff's counsel does not provide any support for the defendant's contention that the plaintiff was a domiciliary of Alabama during the divorce proceeding in that State.

5. The defendant states in its brief that the plaintiff did not register to vote in Alaska until 1974 (he did not move to Alaska until 1974), and that he did not pay state income taxes in Alaska for any year earlier than 1975. The matter of the plaintiff's state income tax returns has already been discussed in item 3.

6. Finally, the defendant says in its brief that "plaintiff conveyed to his attorney the impression that he was still a domicile [sic] of Alabama as late as August 1976."

This is based on a letter which plaintiff's counsel in the Virginia litigation wrote to the plaintiff on August 18, 1976. This letter reflects the attorney's view that the plaintiff was still a legal resident of Alabama and should change his legal place of residence. There is nothing to indicate, however, that the plaintiff himself had "conveyed" such an impression to his counsel, or that the latter had carefully researched the question of the plaintiff's domicile. In any event, the plaintiff is not bound by an opinion on the matter of his domicile expressed by a Virginia attorney in August 1976.

None of the points made by defendant in its brief warrants any change in the opinion previously expressed

that the plaintiff was a domiciliary of Alaska, and not of Alabama, when the divorce proceeding against him in Alabama was in progress.

The "Minimum Contacts" Issue

The defendant argues that, even if Colonel Morton was not a domiciliary of Alabama at the time when the divorce proceeding against him was in progress, and although he was not served with process in Alabama, the Alabama court nevertheless had jurisdiction to enter judgment against Colonel Morton for child support and alimony. In making this argument, the defendant relies on the "minimum contacts" standard originally announced by the Supreme Court in *International Shoe Company v. Washington*, 326 U.S. 310 (1945). In that case, the Court said (at 316) that "due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice'" (citations omitted).

The Court later held in *Shaffer v. Heitner*, 433 U.S. 186 (1977), that the "minimum contacts" standard should be applied also to state court actions *in rem*, involving the property interests of nonresident defendants not served personally within a State. The Court made the sweeping statement (at 212) that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny" (footnote omitted; emphasis added to "all").

Thus, the use of the "minimum contacts" standard in determining whether the Alabama court had jurisdiction to enter against the nonresident Colonel Morton an award of \$500 per month for alimony and child support does not depend on whether the Alabama proceeding, insofar as Patricia Kay Morton sought alimony and child support, was an action *in personam* or an action *in rem* or *quasi*

in rem (on the theory that Colonel Morton's salary was located in Alabama). It seems to be clear, however, that the obligation of the Air Force to pay Colonel Morton for his military service was in the nature of a debt owed to Colonel Morton; and that the property interest in the debt belonged to Colonel Morton as creditor and followed his domicile, which was Alaska at the times involved in this litigation, because "[d]ebts can have no locality separate from the parties to whom they are due." *State Tax on Foreign-held Bonds*, 15 Wall. 300, 320 (1872). Consequently, all aspects of the Alabama proceeding constituted an action *in personam*.

Obviously, the plaintiff's contacts with the State of Alabama during the first 23 years of his life were vastly more than "minimum contacts." He was born in Alabama; he resided there continuously from the time of his birth until July 1957; he received his education in Alabama, through the college level; he was married in Alabama; and his first child was born in Alabama. However, it would offend "traditional notions of fair play and substantial justice" if the plaintiff's contacts with Alabama prior to July 1957 were to be regarded as necessarily conferring jurisdiction on the Alabama courts to enter a money judgment against him some 18 years later, when the plaintiff was a domiciliary and actual resident of Alaska, was not served personally within the territorial limits of Alabama, and did not do anything to subject himself to the jurisdiction of the Alabama court.

The circumstance that the plaintiff's minor children were living in Alabama during the 1974-75 period with his consent and he was providing financial support for the children was not sufficient to confer on the Alabama court jurisdiction to enter a money judgment against Colonel Morton for alimony and child support on the "minimum contacts" theory. *Kulko v. Superior Court of California*, 436 U.S. 84 (1978).

Colonel Morton's contacts with Alabama to which some significance might be attached were: his action in filing,

with Patricia Kay Morton, a joint income tax return in Alabama for the year 1973; and his action in filing an individual income tax return in Alabama for the year 1974. The reasons for these actions by Colonel Morton have already been discussed in another part of the opinion. The joint return for 1973 was filed because Colonel Morton believed that it was necessary that this be done in order that Patricia Kay Morton's household goods might properly be moved from Virginia to Alabama as part of the plaintiff's military household goods move. The individual return for 1974 was filed because Colonel Morton and Patricia Kay Morton were still married in 1974, she had earned income in Alabama and he had earned income in Virginia and Alaska during that year, and Colonel Morton anticipated that it might later be advisable (depending on the outcome of the then-pending litigation in Virginia) for him and Patricia Kay Morton to amend their separate income tax returns for 1974 and file joint returns. Also, Colonel Morton's request to the Air Force that his pay records be corrected to show Alaska, rather than Alabama, as the State to which his state income taxes were payable had not yet been honored.

The facts concerning the Alabama income tax returns for 1973 and 1974 show that it was not Colonel Morton's purpose, in filing the returns in Alabama, to derive any benefit from the State of Alabama.

In order to justify a determination in the present case that the Alabama court had jurisdiction to enter judgment against Colonel Morton for alimony and child support under the "minimum contacts" theory, it would be necessary that the evidence in this case show acts by which Colonel Morton purposefully availed himself of the privilege of conducting activities within Alabama, thus invoking the benefits and protection of its laws. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). Such evidence is lacking.

It is my opinion, therefore, that the Alabama court did not have jurisdiction, under the "minimum contacts" standard, to enter a money judgment for child support and alimony against Colonel Morton in the divorce case.

The Legal Process Issue

The defendant, correctly stating that the writs of garnishment involved in the present case were on the regular form used by the Alabama courts, argues that the Government is therefore insulated against liability by subsection (f) of the garnishment statute (42 U.S.C. § 659, as amended by Pub. L. 95-30, § 501, 91 Stat. 157). Subsection (f) provides as follows:

(f) Neither the United States, any disbursing officer, nor governmental entity shall be liable with respect to any payment made from moneys due or payable from the United States to any individual pursuant to legal process regular on its face, if such payment is made in accordance with this section [659] and the regulations issued to carry out this section.

The defendant, in arguing that subsection (f) is dispositive of the present case, relies mainly on *Overman v. United States*, 563 F.2d 1287 (8th Cir. 1977). In that case, a couple named Overman were divorced in Tennessee, and Mr. Overman was ordered by the Tennessee court to make periodic alimony and child support payments to Mrs. Overman. Mr. Overman later moved to Missouri, where he was employed by the Veterans Administration. Mr. Overman fell behind on the support obligation, and Mrs. Overman secured a writ of garnishment on his salary and served it by mail on Mr. Overman, on the United States, and on the disbursing officer of the Veterans Administration. Mr. Overman then sought to enjoin the disbursing officer from honoring the writ of garnishment, on the ground that the underlying Tennessee divorce decree had been obtained through

fraud. In upholding the dismissal of the suit by the court below, the Court of Appeals said (at 1292-93) :

* * * [W]e will not readily infer that Congress intended to permit federal agencies to be dragged in as defendants by any federal employee * * * who, unhappy with a prior state adjudication, seeks to contest it by suing the Government over wage garnishment rather than challenging the divorce decree in an appropriate state forum. To have federal courts adjudicating such disputes, where the only federal connection is garnishment of government wages, would truly be a case of the tail wagging the dog. * * *

The *Overman* case is readily distinguishable from the case that is now before this court. There was no contention in the *Overman* case that the Tennessee court which ordered Mr. Overman to make alimony and child support payments to Mrs. Overman lacked jurisdiction over the person of Mr. Overman, but, rather, that fraud had been involved in the divorce proceeding before the Tennessee court. In the present case, as pointed out in earlier parts of this opinion, the Alabama court which ordered Colonel Morton to make alimony and child support payments to Patricia Kay Morton did not have jurisdiction over the person of Colonel Morton.

It has long been the constitutional rule that a court cannot adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant. *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 418 (1957). As the Alabama court did not have jurisdiction over the person of Colonel Morton, it was without jurisdiction to adjudicate Patricia Kay Morton's claim against him for alimony and child support; and, therefore, the portion of the Alabama court's decree ordering Colonel Morton to make alimony and child support payments to Patricia Kay Morton was void for lack of jurisdiction.

The writs of garnishment involved in the present case were issued as incidents to the decree of the Alabama court. As the decree of the Alabama court was void for lack of jurisdiction insofar as it ordered Colonel Morton to make alimony and child support payments to Patricia Kay Morton, the writs of garnishment must necessarily fall along with the portion of the decree on which they were based. *Laborde v. Ubarri*, 214 U.S. 173, 174 (1909).

Furthermore, it will be noted that subsection (f) of the garnishment statute insulates the Government from liability only if funds are deducted from the pay of government personnel and paid out pursuant to a writ of garnishment that qualifies as "legal process regular on its face" and if "such payment is made in accordance with * * * the regulations issued to carry out this section."

The pertinent regulations are found in Part 581 of Title 5, Code of Federal Regulations. Section 581.102(f) of Title 5, CFR, defines "legal process" in part as follows:

(f) "Legal process" means any writ, order, summons, or other similar process in the nature of garnishment, * * * which—

(1) Is issued by:

(i) *A court of competent jurisdiction*, including Indian tribal courts, within any State, territory, or possession of the United States, or the District of Columbia * * *. [Emphasis supplied.]

As the Alabama court, in purporting to order Colonel Morton to make alimony and child support payments to Patricia Kay Morton, was not a "court of competent jurisdiction" because it had not acquired jurisdiction over the person of Colonel Morton, the void ancillary writs of garnishment which the Air Force Finance Office honored in this case did not constitute the sort of "legal process"

that would have insulated the Government against liability.

Conclusion

For the reasons previously outlined, it is concluded that the Air Force Finance Office acted arbitrarily and illegally when it ignored the plaintiff's protest that the Alabama court did not have jurisdiction to enter a money judgment against him for alimony and child support, made deductions from the plaintiff's pay, and paid the money over to the Circuit Court for the Tenth Judicial Circuit of Alabama pursuant to writs of garnishment that were void because they were ancillary to a court decree which was void for lack of jurisdiction insofar as it ordered Colonel Morton to make alimony and child support payments to Patricia Kay Morton.

The plaintiff is entitled to recover the money that was illegally deducted from his pay pursuant to the void writs of garnishment.

FINDINGS OF FACT

1. (a) Allan Wayne Morton, a colonel in the Air Force and usually referred to hereafter in the findings as "the plaintiff" or as "Colonel Morton," was born in Birmingham, Alabama, on April 15, 1934. He resided in Birmingham until he went away to college.

(b) At the time of the filing of the petition in this case, the plaintiff was on active duty in the U.S. Air Force.

2. The plaintiff received a bachelor's degree from the University of Alabama in 1957, and a master's degree from Georgia Tech in 1963.

3. (a) The plaintiff married Patricia Kay Morton in Birmingham, Alabama, in 1954.

(b) The plaintiff and Patricia K. Morton had two children, Allan L. Morton, born February 7, 1957, and Brian D. Morton, born November 17, 1960.

(c) Allan L. Morton married in November 1976.

(d) Brian D. Morton became a member of the U.S. Air Force on January 3, 1979.

4. The plaintiff and Patricia Kay Morton maintained their marital residence in the State of Alabama, first in Tuscaloosa and later in Birmingham, from the time of their marriage in 1954 until July of 1957.

5. The plaintiff entered the U.S. Air Force from the State of Alabama in July 1957. At that time, he and Patricia Kay Morton and their first child, then only a few months old, moved to Warner Robins, Georgia, where they lived together until 1960.

6. (a) Upon entering the military service, the plaintiff gave his "Home of Record" as Birmingham, Alabama. No change in this designation had been made as of October 11, 1977.

(b) In military parlance, the term "Home of Record" designates the State from which a member enters the military service, and it is used for the purpose of fixing travel and transportation allowances. The "Home

of Record" is not necessarily a member's State of legal residence or domicile,

(c) "Legal residence" and "domicile" are used in the military service interchangeably to denote the place where a member has his or her permanent home and to which, whenever the member is absent, he or she has the intention of returning.

(d) The plaintiff did not, at any time during his military service, designate the State of Alabama as his legal residence or domicile.

7. (a) When the plaintiff entered the Air Force and moved from the State of Alabama, he intended never to return to Alabama again to live. It was the plaintiff's intention at that time to make Florida his permanent home, and eventually to retire to Florida.

(b) Subsequently, the plaintiff made efforts in 1965 and 1968 to obtain from the Air Force assignments to bases in Florida, so that he could purchase a permanent home there and establish his domicile in Florida. The plaintiff's efforts in that direction were unsuccessful, however, and he himself never became an actual resident of the State of Florida.

8. Pursuant to military assignments which the plaintiff received from the Air Force, he and Patricia Kay Morton moved to, and lived together in, the following places during the period from August 1960 until June of 1968:

(a) In Dayton, Ohio, from August 1960 to June 1961.

(b) In Smyrna, Georgia, from June 1961 to June 1963.

(c) In the Philippine Islands from June 1963 to June 1965.

(d) In Niagara Falls, New York, from June 1965 to June 1968.

9. (a) The plaintiff was assigned to military duty in Vietnam in June 1968; and he served there until June 1969.

(b) While the plaintiff was serving in Vietnam, Patricia Kay Morton and the Morton children lived in St. Petersburg, Florida.

10. When the plaintiff returned to the United States from Vietnam in 1969, he and Patricia Kay Morton bought their first home in Loudoun County, Virginia. They lived together there until Patricia Kay Morton left the plaintiff in 1973, under circumstances that will be described in subsequent findings.

11. (a) In August of 1973, the plaintiff was notified by the Air Force that his next military assignment would be in the State of Alaska. Patricia Kay Morton wished to return to Alabama, and she was unwilling to accompany the plaintiff to Alaska. The refusal of Patricia Kay Morton to accompany the plaintiff to Alaska was one of the important factors which caused Patricia Kay Morton and the plaintiff to separate in September of 1973.

(b) On September 15, 1973, in anticipation of their imminent separation, the plaintiff and Patricia Kay Morton signed a document entitled "Separation Agreement." This document provided in part as follows:

(1) The house in Loudoun County, Virginia, was to be the sole property of the plaintiff, who was to be responsible for paying off the mortgage; and the house was to be sold at the earliest feasible date by the plaintiff.

(2) A 1971 Volkswagen was to be the property of Patricia Kay Morton.

(3) A 1969 Volkswagen was to be the property of the plaintiff.

(4) Patricia Kay Morton was to have possession of all furniture and household goods, except one bedroom suite, one dining set, a rattan set, and the plaintiff's personal tools and professional books.

(5) Patricia Kay Morton was to have the sole custody and control of the two minor sons, with the plaintiff to have reasonable visitation rights.

(6) The plaintiff was to pay Patricia Kay Morton as separate maintenance payments that were to include support for both children, the sum of \$500 per month beginning on October 5, 1973, and continuing for 30 months through March 5, 1976, and thereafter the sum of \$200 per month beginning on April 5, 1976, and continuing for 33 months through December 5, 1978.

(c) The separation agreement also contained the following provision (among others):

* * * Any decree entered in any action for divorce which may be requested by either party shall be agreed to by the other party and shall be consistent with the terms of this agreement and the court is requested to include this agreement in the decree.
* * *

12. (a) On or about September 16, 1973, Patricia Kay Morton took the Morton children and moved to Alabama to live.

(b) The plaintiff continued to live in the Loudoun County house until he moved to Alaska in accordance with the Air Force assignment.

(c) After the plaintiff and Patricia Kay Morton separated, household goods for the use of Patricia Kay Morton and the Morton children were moved to Alabama in 1973 as part of the plaintiff's military household goods moving allowance.

(d) The plaintiff and Patricia Kay Morton have not lived together as man and wife since their separation in September 1973.

13. (a) In 1972 or earlier, the plaintiff had visited Alaska. When he first saw Alaska, the plaintiff changed his mind about establishing a domicile in Florida because he knew he wanted to make his permanent home in Alaska. As early as 1972, he orally asked the Air Force for an assignment to Alaska, but he did not receive such an assignment at that time. In 1973, he again asked for an assignment to Alaska, and on this occasion he received an assignment to Anchorage, Alaska, as of May 1974.

(b) The plaintiff left the former marital home in Loudoun County, Virginia, and moved to Alaska in May of 1974, pursuant to the Air Force assignment previously mentioned.

(c) In connection with his anticipated move to Alaska, the plaintiff entered into a contract for the sale of the house in Loudoun County, Virginia, which he and Patricia Kay Morton had occupied as a married couple. However, shortly before the plaintiff left for Alaska, Patricia Kay Morton refused to sign the deed conveying the Loudoun County house to the purchasers with whom the plaintiff had contracted to sell the property. Up until that time, Patricia Kay Morton and the plaintiff had abided by the terms of the separation agreement dated September 15, 1973.

14. (a) When the plaintiff moved to Alaska in May of 1974, it was his intention to purchase a permanent home in Alaska and to establish a domicile in Alaska. He made his intention known at the time to associates.

(b) The plaintiff, an engineer who preferred outdoor work, thought that Alaska would provide for him great opportunities for employment after his retirement from the Air Force. Alaska has the Alaska Pipeline, an abundance of natural resources, and booming building and expansion jobs for engineers, in addition to being the most beautiful place, in the plaintiff's opinion, he had ever seen.

(c) In 1974, the plaintiff registered to vote in Alaska.

15. (a) On June 1, 1974, shortly after the plaintiff arrived in Alaska, he entered into a contract to purchase a permanent home for himself in Anchorage, Alaska, from Turner Construction Company, for a price of \$62,100. It was the plaintiff's intention to finance this purchase partially with the proceeds from the sale of the house in Loudoun County, Virginia.

(b) The plaintiff was unable to consummate the contract referred to in paragraph (a) of this finding because of financial difficulties attributable to the refusal of

Patricia Kay Morton to sign the deed conveying the house in Loudoun County, Virginia, to the purchasers with whom the plaintiff had contracted for the sale of that house before moving to Alaska.

16. The plaintiff lived on the Air Force base to which he was assigned during his assignment in Alaska.

17. In June 1974, the plaintiff instructed the Air Force Finance Office to change his records to indicate that Alaska was his home State. This was done long before there was any statute commonly known as the Federal Garnishment of Wages Statute (42 U.S.C. § 659 (1976), as amended by Pub. L. 95-30, § 501, 91 Stat. 157).

18. (a) On October 16, 1975, the plaintiff married Ronnette Dreves in Anchorage, Alaska.

(b) The plaintiff and his second wife have two children: Keri L. Morton, born June 19, 1976; and Thomas Christopher Morton, born October 26, 1978.

19. The plaintiff lived in Alaska until 1977, when he was transferred to Andrews Air Force Base, Maryland.

20. (a) Because of Patricia Kay Morton's refusal to sign the deed conveying the house in Loudoun County, Virginia, to the purchasers with whom the plaintiff had contracted to sell the premises (see findings 13(c) and 15(b)), the plaintiff in July 1974, acting through counsel, filed a suit in the Circuit Court of Loudoun County, Virginia, against Patricia Kay Morton for specific performance of the separation agreement dated September 15, 1973.

(b) Patricia Kay Morton filed an answer; and in a prayer for affirmative relief, she asked that the separation agreement of September 15, 1973, be rescinded and declared null and void.

(c) Before trial, Patricia Kay Morton filed a motion for leave to depose the plaintiff as an absent witness. In passing on this motion, the Circuit Court of Loudoun County determined that the plaintiff, a member of the Air Force on active duty, was making his home in Alaska.

(d) A trial was held in the Loudoun County proceeding on July 22, 1975. The evidence at the trial showed (among other things) that the plaintiff had paid Patricia Kay Morton the sum of \$500 per month under the separation agreement, without having missed a payment.

(e) In a decree which the Circuit Court of Loudoun County entered on March 25, 1976, the separation agreement of September 15, 1973, was set aside, cancelled, and annulled.

(f) The plaintiff gave notice of appeal to the Supreme Court of Virginia from the March 25, 1976, decree of the Circuit Court of Loudoun County.

(g) During the pendency of the appeal, the plaintiff and Patricia Kay Morton settled all matters involved in the Virginia case, including the setting aside of the separation agreement. Under the settlement, Patricia Kay Morton was to receive \$12,500 in cash from the sale of the Loudoun County house where the Mortons had maintained their marital residence from 1969 to September 1973, and she was permitted to keep all the personal property (furniture, china, silver, crystal, other valuables collected by the Mortons over the years) and the automobile which she had taken with her when she moved to Alabama from Virginia in September 1973.

(h) In view of the settlement between the plaintiff and Patricia Kay Morton, the Circuit Court of Loudoun County entered a final decree on June 10, 1976, dismissing the cause.

21. (a) In accordance with the settlement mentioned in finding 20, the plaintiff sold the house in Loudoun County, Virginia, and paid Patricia Kay Morton the sum of \$12,500 from the proceeds of the sale.

(b) In addition to paying Patricia Kay Morton the sum of \$12,500, the plaintiff voluntarily continued to make child support payments, as he felt that he was under a moral obligation to do so. The child support payments were at the rate of \$500 per month until the older

child became 18 years of age, and then at the reduced rate of \$250 a month for the younger child until Patricia Kay Morton began garnishing the plaintiff's pay under circumstances described in subsequent findings.

22. (a) On August 28, 1974, Patricia Kay Morton filed suit in the Circuit Court for the Tenth Judicial Circuit of Alabama against Colonel Morton for divorce, for the custody of the two minor children, together with support and maintenance for the children, and for alimony.

(b) Among the papers filed by Patricia Kay Morton in connection with the institution of the suit mentioned in paragraph (a) of this finding was a sworn affidavit executed by Patricia Kay Morton to the effect that Colonel Morton was at that time a nonresident of Alabama.

(c) Suit papers in the Alabama divorce proceeding were sent by registered mail to Colonel Morton in Alaska. He received them on September 17, 1974. No personal service was made on Colonel Morton at any time or at any place in connection with the Alabama divorce suit.

(d) Upon receiving the suit papers in the Alabama divorce proceeding, Colonel Morton promptly went to the Judge Advocate General's Office at Elmendorf Air Force Base, Alaska, and consulted an attorney in that office. The attorney advised Colonel Morton that service by mail was not sufficient to support a money judgment against him.

(e) Colonel Morton did not make an appearance of any kind in the Alabama divorce suit.

(f) There was no affidavit filed among the Alabama suit papers concerning Colonel Morton's military status, and no guardian ad litem was appointed for him, in accordance with section 200 of the Soldiers' and Sailors' Civil Relief Act (50 U.S.C. App. § 520).

(g) The Alabama suit was dismissed for lack of prosecution on April 2, 1975. The dismissal was set aside a few days later, on April 9, 1975, without notice having been given to Colonel Morton.

(h) Colonel Morton having failed, within the time permitted, to plead or otherwise defend in the suit, judgment by default was entered against him on August 14, 1975, by the Circuit Court for the Tenth Judicial Circuit of Alabama. The judgment granted Patricia Kay Morton a divorce from Colonel Morton, it awarded to her the custody of the two children, and it ordered Colonel Morton to pay to Patricia Kay Morton the sum of \$500 each month "as alimony for * * * [Patricia Kay Morton] and partial support and maintenance of the * * * minor children."

(i) The separation agreement of September 15, 1973, between Colonel Morton and Patricia Kay Morton was not introduced before the court or made a part of the record in the Alabama divorce proceeding.

(j) There is no evidence that Colonel Morton committed any act against the marriage in Alabama. The marital disagreements out of which the divorce arose occurred in Virginia. Patricia Kay Morton left Colonel Morton in Virginia.

23. (a) On December 27, 1976, the Air Force Finance Office received by certified mail a writ of garnishment which had been issued by the Register of the Circuit Court for the Tenth Judicial Circuit of Alabama and which sought to garnish pay of the plaintiff in the amount of \$4,100. The writ of garnishment was issued on the regular form used by the State of Alabama.

(b) The writ of garnishment was accompanied by a copy of the judgment that was entered in the divorce proceeding referred to in finding 22. The judgment recited that the present plaintiff was to pay \$500 per month to Patricia Kay Morton "as alimony for * * * [Patricia Kay Morton] and partial support and maintenance for the * * * minor children." Accompanying the writ was an affidavit executed by Patricia Kay Morton stating that the sum of \$4,100 was due and owing "for alimony and child support" under the judgment dated August 14, 1975.

(c) The Air Force notified the plaintiff regarding the receipt of the writ of garnishment. The plaintiff thereupon sought advice from an attorney in the Judge Advocate General's Office at Elmendorf Air Force Base, Alaska. The attorney assured the plaintiff that Patricia Kay Morton could not legally garnish his pay on the basis of the service of process by mail from the State of Alabama.

(d) On December 30, 1976, the plaintiff presented to the Air Force Finance Office arguments to the effect that he had paid all his obligations to Patricia Kay Morton, that he was never properly served or notified of the Alabama divorce proceeding, that he was neither domiciled nor a resident of the State of Alabama, and that the decree of the Alabama court ordering him to pay alimony and child support was void for lack of jurisdiction.

(e) On January 11, 1977, the Air Force Finance Office filed an answer in the Circuit Court for the Tenth Judicial Circuit of Alabama, confessing indebtedness of \$4,100. This amount was subsequently deducted from the plaintiff's pay and was paid over to the clerk of the circuit court.

(f) It is inferred, and found, that the Finance Office did not seek advice from the Judge Advocate General's Office before taking the action referred to in paragraph (e) of this finding.

24. (a) Subsequently, other similar writs of garnishment issued by the Circuit Court for the Tenth Judicial Circuit of Alabama were served on the Air Force Finance Office, which honored the writs deducted amounts from the plaintiff's pay, and paid over such amounts to the clerk of the circuit court.

(b) The evidence in the record does not show whether—or, if so, when—the plaintiff was notified regarding these writs of garnishment.

25. The total amount which the Air Force Finance Office deducted from the plaintiff's pay and paid over to

the clerk of the Circuit Court of the Tenth Judicial Circuit of Alabama pursuant to the writs of garnishment referred to in findings 23 and 24 is not shown by the evidence in the present record.

26. (a) All the writs of garnishment were served on, and honored by the Air Force Finance Office after Allan L. Morton was past the age of 18 and was married.

(b) Some of the plaintiff's pay was garnished after Brian D. Morton was past the age of 18.

27. When the law was changed to require that a military service include in a member's records the State wherein the member would be liable for state income taxes, the Air Force, without the plaintiff's consent and without checking with him, inserted in his leave and earnings statements the State of Alabama (the place from which he had entered the service) as the State to which he would pay state income taxes. Upon learning of this in June 1974, the plaintiff went to the Air Force Finance Office and asked that this error be corrected by showing Alaska as the State to which state income taxes would be paid. The requested correction was not made, however, until April 1976, after the plaintiff had been to the Finance Office three separate times and had, on three occasions, submitted a form to effect the change.

28. (a) The plaintiff and Patricia Kay Morton did not file any state income tax returns in Alabama for the several years during the 1957-72 period because the plaintiff did not consider himself to be a domiciliary of Alabama.

(b) In 1973, as indicated in finding 12(c), the plaintiff agreed to have Patricia Kay Morton's household goods moved to Alabama as a part of his military household goods move. It was his understanding that in order to do this, it was necessary that he file an Alabama income tax return for the year 1973; and, accordingly, in 1974 the plaintiff and Patricia Kay Morton filed a joint income tax return in Alabama for the year 1973. The Mortons also filed a state income tax return in Virginia

for the year 1973, as they were both residents of that State up until the middle of September 1973 and the plaintiff continued to reside there for the remainder of 1973.

(c) The plaintiff filed an income tax return in Alabama for the year 1974. In that year, the plaintiff and Patricia Kay Morton were litigating in the Circuit Court of Loudoun County, Virginia, over the separation agreement of September 15, 1973, but they were still married. Patricia Kay Morton was employed in Alabama and receiving income in that State, while the plaintiff's 1974 income was received partially in Virginia and partially in Alaska. The ultimate outcome of the Virginia litigation was unknown. The plaintiff reasoned that if the Virginia court should set aside the separation agreement and he lost the tax break of a unitary award tax deduction, Patricia Kay Morton might agree to amend their separate income tax returns and file income tax returns jointly with the plaintiff, because they were still married and they would both benefit by such joint filings. This did not happen, however.

(d) The plaintiff filed state income tax returns in Alaska for 1975 and subsequent years.

29. (a) The plaintiff has never registered to vote, and has never voted, in Alabama.

(b) The plaintiff registered to vote in Alaska in 1974.

30. The plaintiff has registered his automobiles in the States where he has been assigned by the Air Force. They have been registered in Georgia, the Philippine Islands, Virginia, Alaska, and Maryland. On one occasion, when the plaintiff was passing through Alabama and visited his sister in that State, he purchased an automobile in his sister's home town and registered it in Alabama. The evidence does not disclose when the automobile was registered in Alabama.

31. In 1974 and 1975, during the pendency of the divorce proceeding instituted by Patricia Kay Morton

against Colonel Morton, the State of Alabama did not have a "long-arm" statute authorizing personal service on nonresidents for child custody, child support, or maintenance and support. At that time, the Alabama rule permitting substituted service was limited to the termination of the marital status, in the absence of the necessary "minimum contacts" required for the Alabama court to exercise personal jurisdiction over a nonresident defendant.

32. On December 17, 1975, the plaintiff's counsel in the Virginia litigation wrote a rather lengthy letter to the plaintiff in Alaska relative to several matters, including the expenses that had been incurred up to that time in connection with the Virginia litigation, the status of the Loudoun County, Virginia, house, and the decree that had been entered by the Circuit Court for the Tenth Judicial Circuit of Alabama in the divorce case by Patricia Kay Morton against Colonel Morton. A paragraph of the letter dealing with the Loudoun County house included the following statement:

* * * The last correspondence I had from you indicated that you were returning to the Washington area and wanted to live in the house yourself. You have an absolute right to do that. In fact, I was under the impression that you would have long since been back here.

33. On August 18, 1976, the plaintiff's counsel in the Virginia litigation wrote a letter to the plaintiff in Alaska. This letter included the following paragraphs:

The last time I checked the Alabama law they could not serve residents by registered mail or serve them by a service in another state. For service of process on a legal resident, the service had to be made within Alabama. However, legislatures are changing the law daily and going to the position that domiciliaries, "legal residents", may be served by mail or by having a sheriff in another state serve

them personally. This would meet due process regulations under the "long-arm" statutes. So I strongly suggest you change your legal place of residence or you might get the old alimony award from the first Mrs. Morton in Alabama perfected, notice of which could be given by mail. You can't expect Alabama not to insist their original order was valid.

The best proof of your having changed your domicile is by voting and of course paying taxes in the new domicile.

CONCLUSION OF LAW

Upon the findings of fact and the foregoing opinion, which are adopted by the court, the court concludes as a matter of law that the plaintiff is entitled to recover, and judgment is entered to that effect. The amount of the recovery will be determined in subsequent proceedings under Rule 131(c).

UNITED STATES CLAIMS COURT

No. 290-77

ALLAN WAYNE MORTON

v.

THE UNITED STATES

ORDER

Pursuant to the order of the United States Court of Appeals for the Federal Circuit, issued October 4, 1982, IT IS ORDERED that judgment is to be entered in accordance with the report, filed December 14, 1981 in this case, recommending a decision to the judges of the United States Court of Claims.

/s/ Alex Kozinski
ALEX KOZINSKI
Chief Judge

JUDGMENT

Pursuant to the above and Rule 58, IT IS ORDERED AND ADJUDGED that judgment is entered this date in this case as provided above.

Filed Oct. 8, 1982

/s/ Frank T. Peartree
FRANK T. PEARTREE
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

IN THE MATTER OF CASES TRANSFERRED TO THIS COURT
PURSUANT TO PUBLIC LAW 97-164, Sec. 403

Before MARKEY, Chief Judge, FRIEDMAN, RICH,
DAVIS, BALDWIN, KASHIWA, BENNETT, MILLER,
SMITH and NIES, Circuit Judges.

ORDER

The court having considered the matter of cases pending in the Court of Claims and transferred to this court on 1 October 1982 pursuant to Public Law 97-164, Sec. 403, in each of which cases a decision and opinion had been recommended to the judges of the Court of Claims, IT IS HEREBY ORDERED:

That the United States Claims Court enter and transmit to this court as soon as possible a judgment corresponding to the decision recommended in each such case, which judgment will be deemed to be on appeal to this court.

FOR THE COURT

/s/ Howard T. Markey
HOWARD T. MARKEY
Chief Judge

4 October 82
Date

APPENDIX D

1. 42 U.S.C. (Supp. V) 659 provides:

(a) United States and District of Columbia to be subject to legal process

Notwithstanding any other provision of law, effective January 1, 1975, moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States or the District of Columbia (including any agency, subdivision, or instrumentality thereof) to any individual, including members of the armed services, shall be subject, in like manner and to the same extent as if the United States or the District of Columbia were a private person, to legal process brought for the enforcement, against such individual of his legal obligations to provide child support or make alimony payments.

* * * * *

(f) Non-liability of United States, disbursing officers, and governmental entities with respect to payments

Neither the United States, any disbursing officer, nor governmental entity shall be liable with respect to any payment made from moneys due or payable from the United States to any individual pursuant to legal process regular on its face, if such payment is made in accordance with this section and the regulations issued to carry out this section.

42 U.S.C. (Supp. V) 662(e) provides:

(e) The term "legal process" means any writ, order, summons, or other similar process in the nature of garnishment, which—

(1) is issued by (A) a court of competent jurisdiction within any State, territory, or possession of the United States (B) a court of competent jurisdiction in any foreign country with which the United States has entered into an agreement which requires the United States to honor such process, or (C) an authorized official pursuant to an order of such a court of competent jurisdiction or pursuant to State or local law, and

(2) is directed to, and the purpose of which is to compel, a governmental entity, which holds moneys which are otherwise payable to an individual, to make a payment from such moneys to another party in order to satisfy a legal obligation of such individual to provide child support or make alimony payments.

2. 5 C.F.R. 581.102(f) (amended 1983) provides:

“Legal process” means any writ, order, summons, or other similar process in the nature of garnishment, which may include an attachment, writ of execution, or court ordered wage assignment, which—

(1) Is issued by:

(i) A court of competent jurisdiction, including Indian tribal courts, within any State, territory, or possession of the United States, or the District of Columbia;

(ii) A court of competent jurisdiction in any foreign country with which the United States has entered into an agreement which requires the United States to honor the process; or

(iii) An authorized official pursuant to an order of a court of competent jurisdiction or pursuant to State or local law, and

(2) Is directed to, and the purpose of which is to compel, a governmental entity, to make a payment from moneys otherwise payable to an individual, to another party to satisfy a legal obligation of the individual to provide child support and/or make alimony payments.

5 C.F.R. 202 (c) (amended 1983) provides:

Where it does not appear from the face of the process that it has been brought to enforce the legal obligation(s) defined in § 581.102(d) and/or (e), the process must be accompanied by a certified copy of the court order establishing such legal obligation(s).

Where the State or local law provides for the issuance of legal process without a support order, such other documentation establishing that it was brought to enforce legal obligation(s) defined in § 581.102 (d) and/or (e) must be submitted.

5 C.F.R. 302 (amended 1983) provides in part:

(a) As soon as possible, but not later than fifteen (15) calendar days after the date of valid service of legal process, the agent designated to accept legal process shall send to the obligor, at his or her duty station or last known home address, written notice:

* * * *

(b) The governmental entity may provide the obligor with the following additional information:

(1) Copies of any other documents submitted in support of the legal process;

(2) That the United States does not represent the interests of the obligor in the pending legal proceedings;

(3) That the obligor may wish to consult legal counsel regarding defenses to the legal process that he or she may wish to assert

5 C.F.R. 581.305 (amended 1983) provides in part:

(a) The governmental entity shall comply with legal process, except where the process cannot be complied with because:

(1) It does not, on its face, conform to the laws of the jurisdiction from which it was issued;

(2) The legal process would require the withholding of funds not deemed moneys due from, or payable by, the United States as remuneration for employment;

(3) The legal process is not brought to enforce legal obligation(s) for alimony and/or child support;

(4) It does not comply with the mandatory provisions of this part;

(5) An order of a court of competent jurisdiction enjoining or suspending the operation of the legal process has been served on the governmental entity; or

(6) Where notice is received that the obligor has appealed the underlying alimony and/or child support order, payment of moneys subject to the legal process shall be suspended until the government entity is ordered by a court, or other authority, to resume payments. However, no suspension action shall be taken where the applicable law of the jurisdiction wherein the appeal is filed requires compliance with the legal process while an appeal is pending.

.

(d) Neither the United States, any disbursing officer, nor governmental entity shall be liable for any payment made from moneys due from, or payable by, the United States to any individual pursuant to legal process regular on its face, if such payment is made in accordance with this part. However, where a governmental entity negligently fails to comply with legal process, the United States shall be liable

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for the amount that the governmental entity would have paid, if the legal process had been properly honored.

3. 48 Fed. Reg. 26279-26294 (1983) amended the pertinent provisions of § 5 C.F.R. Pt. 581 (1983) as follows:

1. In § 581.102, paragraph (f) (1) (ii) is revised to read as follows:

§ 581.102 Definitions.

* * *

(f) * * *

(1) * * *

(ii) A court of competent jurisdiction in any foreign country with which the United States has entered into an agreement that requires the United States to honor such process; or

* * *

9. In § 581.305, paragraph (a) (6) is revised and paragraph (f) is added to read as follows:

§ 581.305 Honoring legal process.

(a) * * *

(6) Where notice is received that the obligor has appealed either the legal process or the underlying alimony and/or child support order, payment of moneys subject to the legal process shall be suspended until the governmental entity is ordered by the court, or other authority, to resume payments. However, no suspension action shall be taken where the applicable law of the jurisdiction wherein the appeal is filed requires compliance with the legal process while an appeal is pending. Where the legal process has been issued by a court in the District of Columbia, a motion to quash shall be deemed equivalent to an appeal.

* * *

(f) If a governmental entity receives legal process which, on its face, appears to conform to the laws of the jurisdiction from which it was issued, the entity shall not be required to ascertain whether the authority which issued the legal process had obtained personal jurisdiction over the obligor.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1853

BRUCE WARREN RUSH, APPELLANT

v.

U.S. AGENCY FOR INTERNATIONAL
DEVELOPMENT, ET AL., APPELLEES

Appeal from the United States District
Court for the District of Columbia

Before: Mikva, Edwards and Scalia, Circuit Judges

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was briefed and argued by counsel. The issues presented have been accorded full consideration by the court; they occasion no need for an opinion. See D.C. Cir. Rule 13(c). On consideration of the reasons set forth in the attached memorandum, it is

ORDERED and ADJUDGED, by this Court, that the judgment of the District Court appealed from in this cause is hereby affirmed.

It is FURTHER ORDERED, by this Court, *sua sponte*, that the clerk shall withhold issuance of the mandate herein until seven days after disposition of any

105a

timely petition for rehearing. See D.C. Cir. Rule 14,
as amended November 30, 1981 and June 15, 1982.

PER CURIAM
FOR THE COURT

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Filed: April 26, 1982

Rush v. U.S. Agency for International Development,
No. 82-1853 (Filed April 26, 1983)

MEMORANDUM

Bruce Warren Rush appeals from the district court's dismissal of his complaint against the United States Agency for International Development (AID) and its administrator. Rush, an AID employee, seeks to prevent AID from complying with a Florida garnishment order that requires the agency to withhold a portion of Rush's salary. He also seeks a return of previously garnished monies. The garnishment was ordered by a Florida state court in 1979 and served on AID pursuant to 42 U.S.C. § 659 (Supp. IV 1980) after Rush failed to make child support payments required by the state court in an earlier divorce judgment. The support order grew out of a divorce action Rush brought in 1976.

Rush alleges that the district court should not have accorded the Florida judgment and garnishment order full faith and credit because of various defects in the judgment. In particular, Rush alleges that the Florida judgment is void because, *inter alia*, the judge who entered judgment was not the same judge who heard the trial testimony, the underlying marriage on which the divorce decree was premised was invalid, the woman who contested the divorce was not his wife, and the child for whom the Florida court ordered support payments was not his offspring. Finally, Rush alleges that AID violated his constitutional rights by recognizing a judgment rendered by a court which lacked jurisdiction over him.

Under the principle that the United States cannot be sued without its consent, sovereign immunity traditionally has prohibited the enforcement of garnishment orders directed at monies received from the government by federal employees. See *Federal Housing Administration v. Burr*, 309 U.S. 242 (1940). Since the original enactment of the federal garnishment statute in 1975, however, this immunity has been subject to a limited

waiver encompassing garnishment orders, issued by courts of competent jurisdiction, that enforce alimony and child support obligations. 42 U.S.C. § 659(a) (Supp. IV 1980); *see* 5 C.F.R. §§ 581.101-501 (1983). At the same time, the liability of the United States, its agencies, and its officers for withholding or redirecting payments under the statute is strictly limited if the garnishment is made pursuant to "legal process regular on its face" and in accordance with the statute and its implementing regulations. 42 U.S.C. § 659(f) (Supp. IV 1980). In the present case, Rush has not claimed that the garnishment order was facially invalid or that AID violated statutory requirements or applicable regulations. Thus, at least to the extent that Rush seeks reimbursement of funds previously garnished, he is barred by the statute from litigating those claims against AID or its administrator.

To the extent that Rush seeks injunctive relief, most notably for the constitutional claims that he raises, the district court correctly premised its jurisdiction on 28 U.S.C. § 1331 (Supp. V 1981). But Rush is properly foreclosed from litigating in federal court the merits of the divorce decree or the garnishment order issued by the Florida courts. Under 28 U.S.C. § 1738 (1976), federal courts, absent circumstances not present here, must give full faith and credit to state court judgments. Moreover, the alleged constitutional defects in the Florida judgments that might be remediable in federal court are wholly without merit, as the district court held.

In reaching our decision, we do not attempt to decide the merits of those claims raised by Rush that question the propriety of the actions taken by the Florida courts. Rather, consistent with the general policy that domestic relations is a field peculiarly suited to state regulation and control, we only mean to suggest that the Florida state courts, and not the federal courts, are the appropriate forum for litigating these claims. Rush must seek his relief from the Florida courts.

APPENDIX F

[SEAL]

THE COMPTROLLER GENERAL
OF THE UNITED STATES
Washington, D.C. 20548

DECISION

File: B-203668

Date: February 2, 1982

MATTER OF: Technical Sergeant Harry E. Mathews, USAF

DIGEST: The Air Force, which had been complying with a Florida state court order garnishing the pay of one of its members from June 1976 through May 1980 for child support, incurred no obligation to reimburse the member when the garnishment was later set aside by the court. The original court order was reviewed by the Air Force which found it appeared valid on its face. Therefore, pursuant to 42 U.S.C. § 659, the Air Force was required to comply with it, and by doing so incurred no liability. Also, 42 U.S.C. § 659(f) (Supp. III, 1979) currently provides that no agency or disbursing officer will be held liable for making payments when the legal process appears valid on its face.

This action is in response to an appeal by Technical Sergeant Harry E. Mathews, USAF, of our Claims Group's disallowance of his claim for reimbursement of amounts withheld from his pay and for other expenses he incurred pursuant to the garnishment of his Air Force pay during the period June 1976 through May 1980. The pay Sergeant Mathews is claiming was withheld by the Department of the Air Force pursuant to an

order for child support issued by a Florida Circuit Court in March 1976. There is no authority to reimburse the claimant for pay garnished under an order which, at the time the pay was garnished, was valid on its face, nor is there authority to reimburse him for other expenses he incurred in connection with the garnishment.

In 1976, while Sergeant Mathews was assigned overseas, he received notice that, due to a lawsuit brought against him in Florida for child support, a Florida state court had issued a garnishment order against his pay. Under the order, his pay was to be garnished until December 1992, and an arrearage of \$1,150 was also to be collected. The Air Force determined that the order was valid on its face and began complying with it by withholding the required amounts from his pay. Contending that he had no prior notice of the lawsuit, and that it was based on fraud, Sergeant Mathews sought help from the Government to challenge the order. However, since it was primarily a private matter, the Air Force advised him to seek civilian counsel to challenge the order in the Florida courts.

Sergeant Mathews contends that he encountered difficulty in securing civilian counsel. He also states that the hearing date on his Motion for Relief from Judgment was postponed several times and that, for an extended period of time, his file was missing from the appropriate court, causing further delay. Throughout this time, payments of \$151.67 a month plus \$50 a month in payment of the arrearage were garnished from his pay.

In May 1980, he was heard in the Florida court on a Motion for Relief from Judgment, and by order dated May 20, 1980, a judge of the Circuit Court for the Eleventh Judicial Circuit, Dade County, Florida, ordered the garnishment set aside. On the basis that this order indicates that the garnishment should never have taken place, Sergeant Mathews filed a claim with the Air Force for reimbursement of the amount paid during the period

June 1976 through May 1980 as well as other expenses he indicates arose out of the matter. The Air Force Accounting and Finance Center, noting that it found no basis for reimbursement, sent the claim to our Claims Group which disallowed it on September 2, 1980.

The issue in this case is whether the Government is authorized to reimburse a service member for money garnished from his pay pursuant to a state court order to which the Government is subjected under 42 U.S.C. § 659, when the order has been overturned. The order in this case was set aside presumably due to insufficient personal jurisdiction by the court over the member.

Under the provisions of 42 U.S.C. § 659 (Supp. III, 1979) the Government has waived its sovereign immunity for the limited purpose of subjecting itself to state actions to garnish the pay of its employees and members of the Armed Forces but only when garnishment is to provide child support and alimony. When the Air Force was served with a garnishment order valid on its face it was required to comply with it, and the Government incurred no liability to Sergeant Mathews in doing so. Thus, where an order appears regular on its face, the Government must garnish wages to make payment, and in fact, may be held liable if it fails to do so. See 56 Comp. Gen. 592 (1977). See also 42 U.S.C. § 659(f) which specifically provides that neither the United States, any disbursing officer, nor governmental entity is liable for payments made under this authority "pursuant to legal process regular on its face."

The inquiry into whether an order is valid on its face is an examination of the procedural aspects of the legal process involved, not the substantive issues. Whether a process conforms or is regular "on its face" means just that. Facial validity of a writ need not be determined "upon the basis of scrutiny by a trained legal mind," nor is facial validity to be judged in light of facts outside the writ's provisions which the person executing

the writ may know. *Aetna Insurance Co. v. Blumenthal*, 29 A.2d 751, 754 (Conn. 1943).

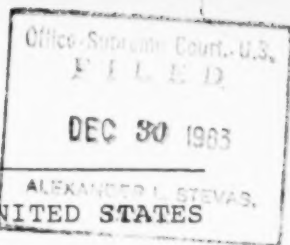
As is indicated above, when the Air Force received the garnishment order, they reviewed it and found it valid on its face and in conformity with the Florida law. Sergeant Mathews has not shown that that finding was incorrect. Instead, he argued that the order was invalid because it was obtained by fraud, and that he had not been properly served in the original court action against him. As the Air Force advised him, these were matters for him to litigate in the courts and not for the Air Force to decide. That is, they were not challenges to the facial validity of the garnishment order. While the order was set aside in 1980, it was valid at the time payment was being made under it, and the Government had a duty to comply with it until the court modified it. There is no authority for reimbursement of the amounts withheld from Sergeant Mathews' pay, nor is there authority to reimburse him for the legal and other expenses he claims he incurred in having the order overturned.

Accordingly, the disallowance of the claim is sustained.

/s/ Milton J. Socolar
Acting Comptroller General
of the United States

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NO. 83-916



IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

ALLAN WAYNE MORTON

BRIEF IN OPPOSITION TO PETITION FOR
A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
FEDERAL CIRCUIT

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CORRECTION OF THE
QUESTION PRESENTED

Whether the United States Air Force may take the pay of one of its members and pay it over to such member's former wife on the basis of a void judgment of a state court, the judgment being void for lack of in personam jurisdiction over such member, when the Air Force knew the said state court's judgment was void before it first took such member's pay, and after taking such member's pay be immune from suit by the member against the Air Force for such member's military pay?

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BRIEF IN OPPOSITION

TO THE HONORABLE CHIEF JUSTICE AND
JUSTICES OF THE SUPREME COURT OF
THE UNITED STATES:

Comes now ALLAN WAYNE MORTON, by
Counsel, and files this his Brief in
Opposition to the Petition for a Writ of
Certiorari filed by the United States in
this cause and, as grounds therefor,
respectfully states as follows:

This case was brought against the
United States (Air Force) to recover a
Military Member's pay pursuant to Title
37, Sec. 204 et seq., United States Code
and the Fifth Amendment to the
Constitution of the United States.

(R.App.1a) (P.App.A-1a). The Defendant
continues, however, to state that the
government was held liable in damages
for honoring a Writ of Garnishment void

for lack of jurisdiction over Col. Morton. The monetary award is not damages but the restoration of the member's pay and allowances which the Air Force wrongfully failed to pay him. It is settled that a member of the military may sue for his pay and allowances in the Court of Claims (Claims Court). Bell v. U.S., 366 U.S. 393. The United States' defense was that it took his pay and allowances pursuant to 42 U.S.C. 659. It is the subject matter of the Petition, Complaint, Declaration, Motion for Judgment, or whatever it may be called in the various courts, that determines the jurisdiction of the court over the subject matter of the lawsuit and not the subject matter of the defense. Louisville & Nashville R.R. vs. Mottley, 211 U.S. 149 (1908). This is a military pay case and not a domestic relations case. The government is also incorrect in its argument that the lower court's decisions

put the Federal Courts into the business of domestic relations. It is the Congress of the United States in enacting 42 U.S.C. 659 that put the United States into the business of garnishing pay for alimony and child support out of which arises a claim for such pay. This suit arose because the Respondent's military pay was not paid to him. The government's contentions are, putting it quite simply, that 42 U.S.C. 659 and its later amendments authorize it to take the pay of one of its members on the basis of what the Air Force knew, before it took the pay, was a void judgment.¹ In other words, the government's position is that 42 U.S.C. 659 authorizes their

¹The Air Force was not only notified that the judgment and writs were void but it was also furnished the entire record of the Alabama case which showed the lack of any valid service of process under Alabama law. (P. App. 39a, para 8).

taking of the pay and allowances of a military member without due process of law and in spite of the fact that the government is aware that the taking was without due process of law when the taking occurred.

That the Alabama judgment for alimony and child support and the writ of garnishment issued pursuant thereto are void is not questioned nor argued by the government in its Petition before this Court. Indeed, such an argument would be difficult in face of the facts in this case. Col. Morton was not personally served with process to bring him before the Alabama court (P.App.89(a)); he was not a domiciliary of Alabama when the suit was filed (P.App.71a); he had no "minimum contacts" with Alabama when the suit was filed (P.App.78a); there is no evidence Col. Morton committed any act against the marriage in Alabama (P.App.90a), and the

Mortons last lived together in Virginia (P. App.85a); Alabama had no "long-arm statute" for alimony and child support when the Alabama suit was filed (P.App.93a, 94a) except of course the Uniform Reciprocal Enforcement of Support Act, and Col.Morton made no appearance of any kind in the Alabama divorce suit. (P.App.89a). To this must be added the facts that the Alabama suit was dismissed prior to judgment for lack of prosecution and the dismissal set aside without any Notice to Col.Morton, (P.App.89a), and that Col.Morton paid \$500 per month voluntarily to Patricia Kay Morton from the date of their separation until the garnishment of his pay began, (P.App. 88a, 89a). The initial garnishment was for \$4,100.00, which amount Col. Morton could not have owed, assuming the Alabama court had had jurisdiction over him by virtue of the fact he had

voluntarily paid Mrs. Morton. The Air Force knew all of this prior to the taking of Col. Morton's pay. (P.App.66a). It must also be noted that there was no affidavit filed among the Alabama suit papers concerning Col. Morton's Military status, and no guardian ad litem appointed for him in accordance with Section 200 of the Soldier's and Sailor's Civil Relief Act, 50 U.S.C. App.Sec.520. (P.App.89a).

The arbitrariness of the United States in the administration of Col. Morton's pay is amply and repeatedly shown from the record. The clear language used in 42 U.S.C. 659, effective January 1, 1975 stated that the obligations that could be honored by the United States had to be "... legal obligations to provide child support or make alimony payments." (Emphasis added). The statute was initially silent as to the liability of the government for wrongful and illegal taking of the property of a

military member or employee. (R.App.2a).

In 1975 the Department of Defense Pay Manual Section 70710. Garnishment of Pay for Enforcement of Child Support and Alimony Obligations, (R.App. 3a), made it clear to the military that garnishment of a member's pay had to be based on an order by a court of competent jurisdiction. The Air Force cannot claim ignorance of its own Regulations, Department of Defense Regulations being binding on the Air Force.

Between the time of the initial enactment of 42 U.S.C. 659 in 1975 and the amendment of it in 1977 there had already been at least one suit against the United States concerning this statute, Popple v. U.S. 416 F.Supp.1227 (1976) and at least two more cases filed and ready for decision, Overman v. U.S. 563 F.2d 1287 (1977) and Calhoun v. U.S. 557 F.2d 401 (1977). Congress had the opportunity to totally exempt the government from any liability

by merely saying any order received by the government for garnishment of a member's pay will be honored by the government and there shall be no liability on the part of the government for honoring any order for alimony and child support. Congress did not do that. It added subsection (f) (P.App.98a) which is very clear that the United States shall enjoy immunity with respect to these payments "... made from moneys due or payable from the United States to any individual pursuant to legal process regular on its face, if such payment is made in accordance with this section and the regulations issued to carry out this section." (Emphasis added). When Congress amended 42 U.S.C. 659 in 1977, it also repeated and reiterated the phrase, "... legal obligations to provide child support or make alimony payments." (Emphasis added). (P.App.99a), it added Definitions in Section 662 (b) and (c), (b) defining child support

and (c) defining alimony. (R.App. 3a). The Congress again made it quite clear that the government may only honor "legal obligations", as a result of a "judgment issued in accordance with applicable State law by a court of competent jurisdiction." The Congress also defined "legal process" used in 42 U.S.C. 659(a) in subsection (e) (P.App.98a-99a) as that process issuing from a court of competent jurisdiction.

The statute by its own terms defines what alimony and child support are for the purposes of this Act. No matter what other definition there may be, in Federal garnishment proceedings, we are limited to these definitions. Pursuant to 42 U.S.C. 659, there is no alimony or child support unless it issues from a Court of competent jurisdiction. In order to insulate the defendant from liability, orders and decrees honored by the defendant must be from a court of competent jurisdiction and

must be legal process regular on its face issued from a court of competent jurisdiction. The immunity of the United States for taking a member's pay is, therefore, by clear terms of the statute, a limited immunity. In stating very clearly in what situations the United States could not be sued, Congress obviously rejected any contention that it could never be sued. The enumerations of exclusions from the operation of a statute indicate that the statute should apply to all cases not specifically excluded, Ex Parte McCardle, 7 Wall. (74 U.S.) 509; Stephens v. Smith, 10 Wall (77 U.S.) 321. The legislative history of the 1977 amendments to 42 U.S.C. 659 made it quite clear that the amendments were to clarify the act. Section 501 of Public Law 95-30 contained the amendments. Public Law 95-30 was the Tax Reduction and Simplification Act of 1977. As introduced, it contained no provisions concerning garnish-

ment, H.R.3477, 95th Cong.1st.Sess.1977;
Senate Report No.95-66, 5 U.S. Code Cong.
& Adm.News 751 (1977). Section 501 of the
act was added to the amendments on the
floor of the Senate, (125 Cong.Rec. S.6722)
by Senator Nunn who said,

"The intent of these amendments
that I am introducing today will
be to clarify the garnishment
provisions to provide for administrative
improvements and to aid in the evaluation
of the program."

A general explanation was included in the
Congressional Record, Part A., "Clarification
of Garnishment Provisions" stated the object
of Section 501 (the amendments to 42 U.S.C.
659] was to clarify existing law. 125 Cong.Rec.
S6723, April 29, 1977. The question thus
arises why Congress felt the need to clarify
42 U.S.C. 659 By these amendments if the
government's position is correct;
that is that even if the government knows
the judgment of the State Court which issued
the writ is void, the government owes no

duty to its military members and is obligated to take his property and give it to the wife or former wife of such member upon receipt of a copy of this void writ because it is on a regular form issued by the State Court. For such a position as the government's, no interpretation or clarification by amendment of the statute was needed. Congress, by amending the statute to read that the government would not be liable when it honored a State Court Order if the writ was legal process regular on its face, issued by a Court of competent jurisdiction, intended to insulate the government from suit when they honored a "voidable" judgment as opposed to a "void" judgment, void because the Court issuing it had no jurisdiction of the subject matter or no jurisdiction over the defendant to enter such an order. The fact that the amendments to 42 U.S.C. 659 fail to state that the government is totally, unequivocally, and

completely immune from liability for the taking of a military member's or its employee's pay is not error of omission on the part of Congress. The amendment was clearly an attempt to make the statute, 42 U.S.C. 659, constitutional in its application by assuring that the military member or its employee is afforded due process of law. To accept the government's position is to license the denial of due process of law by the United States. No such intent should or could be attributed to Congress. The Illinois Supreme Court in Herb v. Pitcairn, 384 Ill.237, 51 N.E. 2d 277, 280 explains the distinction between "void" and "voidable" judgments as follows:

"It is the element of jurisdiction that differentiates a void from a voidable judgment; both the subject matter and the parties must be before the Court, and jurisdiction of the one without the other will not suffice; the two must concur or the judgment will be void in any case in which the court assumes to act. Rabbitt v. Weber & Co., 297 Ill.491, 130 N.E.787. And we have further held that even a

Court of general jurisdiction has no power to do any act or render any judgment affecting persons or property, unless the particular act or judgment is brought within its jurisdiction according to law. People ex rel. Brundage v. Righeimer, 298 Ill.611, 132 N.E. 229. These are general principles upon which substantially all courts are in agreement."

The cases cited by the government in its Petition are all distinguishable from the case at bar. Overman v. U.S. 563 F2nd 1287, did not allege nor prove that the garnishment was based on a void judgment. Neither was Overman a suit for pay and allowances wherein the Federal Court had subject matter jurisdiction. It was alleging the underlying judgment was based on fraud. If proven, it is, thus, a voidable judgment to be set aside by the Court entering it.

Jizmerjian v. Dept. of Air Force, 457 F.Supp.820 (1978) App'd.607 F2d 1001 (1979) Cert.den.444 U.S.1082 (1980) is factually different in that Mr.Jizmerjian

appeared in the Arizona Court in the underlying divorce case. The Arizona Court had jurisdiction over him and once having jurisdiction, such jurisdiction continues. Cunningham v. Department of the Navy, 455 F. Supp.370 (1978), Popple v. United States, 416 F.Supp.1227 (1976) and Snapp v. U.S. Postal Service - Texarkana (1982) ^{664 F2d 1329} are distinguished from the case at bar in that the cause of action alleged in the case at bar is one for military pay, whereas Cunningham, Popple and Snapp based their causes of action on 42 U.S.C. 659 which the courts have held did not grant a cause of action. The cause of action of the Plaintiff in a law suit is the factor that determines whether the court has subject matter jurisdiction. Although Calhoun v. U.S. 557 F.2d 401, cert.den.434 U.S.966 (1977) was a claim for military pay, the government's reliance on it is misplaced. In the Calhoun case the service of process

for the support award was in accordance with the laws of California, the state from which the judgment issued. California had a long-arm statute. California Code, Sec. 415.40. There was no notice given in that case to the Navy (U.S.) that Mr. Calhoun was not a domiciliary of California. To the contrary, Mr. Calhoun did not offer the Court any evidence of where he was domiciled. The Court in Calhoun held that "the fact of the judgment shows that service of process was had in accordance with California Code Sec. 415.40." This section provides for service of process by mail when the Defendant has minimum contacts with California or is a domiciliary there. The Appeals Court said of Calhoun that it was argued prior to the clarifying amendments and thus had failed to consider the Court of competent jurisdiction requirements. (P.App.10a).

Col. Morton has consistently, from the inception of this case, alleged that

the Alabama judgment was not "regular on its face" as well as not meeting the criteria of "legal process" defined by 42 U.S.C. 659. The lower court did not feel the need to address the "regular on its face" issue after it found that "legal process" had not been met. The term is "legal process regular on its face", not just "regular on its face." Assuming, arguendo, that "regular on its face" were the only words of the statute to be considered, the question arises as to what is the "face" of the judgment. The "face" of the judgment is not the last document filed in a cause; it is the entire record of the case. Groth v. Ness, 260 N.W. 700 (1935). As stated in Application of Behymer, 130 Cal.App.200, 19 P.2d 829, "a judgment is 'void on its face' when its invalidity is apparent upon inspection of the judgment roll." See also Vaughn v. Vaughn, Ala.100 So.2d9. The case

of Pettis v. Johnson, 78 Okl. 277, 190 P. 681 (1920) cited for this definition gives a very scholarly discussion of voidable and void judgments. When the record shows that the initial service of process is void, a judgment based on such process is not "regular on its face" but is void.

The government relies heavily on the dissenting opinion of the court below. That reliance is also misplaced as the dissent went astray on several crucial points. The dissent states that an employer has no duty to litigate the validity of a pre-existing judgment on which garnishment is based but cites no authority for the statement. It further stated that there is no authority that an employer has a duty to raise defences of the employee. There is considerable authority for such position. Pounds v. Hammer, 57 Ala. 342; Badler v. L. Gillarde Sons Co. 387 Pa. 266, 127 A.2d 680.

The Government, as garnishee has a duty to assert all proper defenses of its creditor of which the Defendant has knowledge. 6 Am.Jur. 2d, Attachment and Garnishment, Sec.357 and Stewart v. Northern Assurance Co., 32 S.E. 218. The government had knowledge of the invalidity of the judgment in the case at bar. The government cites Alabama statutes which say that payment of money or property in the hands of the garnishee relieves the garnishee of all liability therefor to its creditor. The government in its Petition also cites many such statutes from other states. However, every such statute is predicated upon the fact that the court issuing the original judgment had jurisdiction of the person and the subject matter. Otherwise, those statutes would be authorizing the taking of property without due process of law. Jurisdiction of the subject matter and the parties is the threshold question of every cause of

action and the court must have jurisdiction of both. "A judgment rendered without such jurisdiction is in violation of the due process clause of the United States Constitution and is not merely voidable but void." 46 Am.Jur.2d Judgments, Sec.25 p.330. The Courts are agreed that if the judgment in a garnishment proceeding is void because of lack of either subject matter jurisdiction or jurisdiction over the Defendant, payment by a garnishee is no protection to him against a subsequent action by his creditor to recover the debt. 49 A.L.R.1411 Annotation-Garnishment-Void-Protection and which cites Louisville & N.R. Co. v. Nash, 118 Ala. 447, 23 So.825 (1897), and Southern R.Co. v. Ward, 123 Ala.400, 26 So.234 (1898), 38 C.J.S. Garnishment 293 (e) & (2). Thus, the government's reliance on the dissent which stated the majority opinion subjects the government

to greater liability and administrative burdens than are borne by private garnishees is in error. The government is not a mere stakeholder under the established law on this subject. If the government knows that the judgment is void, it has a duty not to honor a garnishment based on it and if it does, it's liable in a proper cause of action brought against it.

The dissent asserts that it's immaterial that Alabama had no long-arm statute (except U.R.E.S.A.) because of the judicially established law of Alabama. (P.30a). What the dissent and the government do not acknowledge is that the case referred to by the dissent is a tort case based on the Defendant doing business in Alabama. Alabama had a "long arm" statute for such cases as well as motor vehicle torts, Alabama Rules of Civil Procedure, Rule 4, Process, (b), B., C. (1973) but substituted service was allowed for divorce termination

(status) only. Alabama Rules of Civil Procedure, Rule 4, Process (c) (1) (B) (1973). (R.App.5a).

When a long-arm statute says divorce and does not include the terms alimony and child support, process pursuant to such statute is limited to adjudication of status and does not permit in personam judgments.

May v. Anderson, 345 U.S.520 (1953).

Divorce has long been severable from alimony, custody and child support.

The dissent also confuses void judgments with voidable judgments. "The rendition of a judgment without jurisdiction is a usurpation of power and makes the judgment itself coram non iudice and ipso facto void."

46 Am.Jur.2nd Judgments Sec.22. A void judgment is indeed void for every purpose and has no effect whatsoever. 46 Am.Jur.2d Judgments, Sec.49. It is the voidable judgment that needs to be set aside in the court from which it issued, not the void judgment 46 Am.Jur.2d Judgments, Sec.48.

Too, garnishment is merely ancilliary to the judgment and cannot exist without a valid judgment to support it. 6 Am.Jur.2d Attachment and Garnishment, Sec.11. It is not a separate case. No court proceeding is needed to set aside a void judgment. 46 Am. Jur. 2d Judgments, Sec.49. Therefore, the dissents dissertation on Relief From Void Judgments (p.31a, 32a, 42a), is inappropriate. Such applies to voidable judgments only.

Contrary to the dissent's and the government's argument that the majority's opinion destroys the intended purposes of 42 U.S.C. 659, the majority decision applies the statute so that 42 U.S.C. 659 is not constitutionally suspect by an interpretation that condones the taking of property without due process of law and in accord with the intent of the 1977 Amendment. Also contrary to the government's contention, the majority decision has construed 42 U.S.C.659 so that

its provisions are consistent. Throughout, it speaks of "court of competent jurisdiction". The limitation on the amount that can be garnished also refers to "court of competent jurisdiction", 15 U.S.C.1673 (R. App. 8a).

Neither will the majority's decision cause chaos, nor an unmanageable burden for the government. The government states in its Petition that the salaries of 13,000 servicemen are being garnished but gives no explanation as to how they arrived at this number. It can only be assumed, then, that this number is the total amount of garnishments of all servicemen. This statement is glaring for its failure to state how many of these garnishments are based on ex-parte judgments. Ex-parte judgments are unusual to say the least. Of those garnishments in which the member or employee notifies the government of jurisdictional deficiency of the court, all the government

has to do is require the production of two extra documents attached to the divorce decree which will normally consist of two pieces of paper. The first of these is a copy of the return of process and the second, the law of the state regarding the process required. That is no large burden to place upon counsel for the Plaintiff to have to produce nor for the government to have to read. This is particularly true in the infinitesimal small number of ex-parte garnishments wherein the government has been notified that the issuing court had no jurisdiction. The government is required to make legal determinations, even in its own view of this matter. It cannot have escaped notice that Congress has, since this Morton case, enacted the "Uniformed Services Former Spouses Protection Act, 10 U.S.C. 1408. (R.App. 8a). This Act in Section 1002 (a) Chapter 71 of Title 10 U.S.C. contains much of the same wording

as 42 U.S.C. 659 and although it has no application to the case at bar, it imposes duties upon the government that coincide, but to a much greater extent, with duties it would have under the majority opinion. Thus, the machinery is already required to determine far more extensive legal questions of the same or similar type that arose in this case.

The Staff Judge Advocate, at least in the Air Force, has assigned attorneys whose principal duties are to review state garnishments. (P.App.37a). To have to review two additional pages which can be read in only a minute should not be too great a burden for them to overcome. What these attorneys are saying is "it's not my job." It is their job. In ex-parte decrees based on minimum contacts the judgment has to set forth the jurisdictional facts it relied upon when entering the judgment. This should be very simple for the government.

All it has to do is require its members to set forth their domicile on their pay record and update it every six months. Surely, a certain very small percentage will be erroneously fed into the computer, but this cannot constitute chaos nor a gargantuan administrative burden to the government. Further, administrative burden has never been an excuse for denial of due process of law. "And when we enter the realm of 'strict judicial scrutiny', there can be no doubt that "Administrative convenience" is not a shibboleth, the mere recitation of which dictates constitutionality." Frontiero v. Richardson, 411 U.S. 677, (1973).

The government argues it may have to pay twice. Not so. It can sue over against Mrs. Morton. The government is present where Mrs. Morton is and it doesn't have to travel anywhere. In fact, if the government had done that initially, this case would have terminated right then for it, but it

refused, even when requested to do so.

The government (P.App.15a) states, "It is costly for the wife to litigate in a distant state;" "It prevents husbands from evading payment by changing residences." It is absolutely astounding that the Solicitor General of the United States contends that this cause should be adjudicated on a gender basis. However, it is quite clear that such is their premise.

Does it really think that litigation for the husband in Alabama when he is in Alaska is cheap; or for that matter effective? Does it not know that wives forum shop and do so deliberately knowing a husband can't get to a hearing? The government is making this case into one of a gender based application of a federal statute. What the government is assuming in its argument (P15) is that a male (husband) can make or have money but a female (wife) is incapable of

making or having money. This is a real "put down" for females. However, such was put to rest in Orr v. Orr, 440 U.S. 268, (1979)

Further, if the government was to succeed in its contention, it would have to transfer every military member who is a defendant in a divorce suit to the forum for which such member's spouse may have carefully shopped, in order for the member to be able to litigate the matter. Such a case could take years. This case has already taken over five years. Otherwise, the members must forfeit their property on the strength of a void judgment because it's bothersome for the government to review questionable garnishments. A military member's body is not his or her own. He or she must be where he or she is ordered to be and where the exigencies of the service demand, not where some litigation is taking place. The doors of the Virginia

Courts were open to Mrs.Morton during all the years she and Col.Morton lived in Virginia and for a full nine months after she left him here.Sec.20-97 Virginia Code. (R.App. 114. She apparently was dissatisfied with Virginia law.

The Uniform Reciprocal Enforcement of Support Act adequately protects the spouse and children in need of support and also gives the obligor for support the right to a hearing. The government argues that the member who is retired may move. What the government fails to realize is that once there is a valid Uniform Reciprocal Enforcement of Support Act support order, it will support a garnishment. But, the government argues, prosecutors fail to prosecute under the Uniform Reciprocal Enforcement of Support Act. We are not here to argue merits of prosecutors. Some are very good and some are very bad. We are here to determine whether machinery is present to provide a judgment which will support a garnishment.

The government refers to a decision of the Comptroller General dated 2 February, 1982 (B-203668-Matter of Technical Sergeant Harry E. Mathews, USAF) and attaches a copy of the decision as its App.F. The Comptroller General refused to allow Sergeant Mathews to be reimbursed the amounts that had been taken from his pay between the dates that an ex-parte judgment had been rendered against him in Florida and the date that the Florida court ordered the garnishment set aside. The only basis for disallowing his claim was that the documents received by the Air Force Finance Center were "regular on their face". At no place in the opinion does the Comptroller General, who, although basically a financial administrative officer, has certain "quasi-judicial" responsibilities when he rules on requests of doubtful expenditures presented to him by finance officers, mention the basic legal issues

in these cases. That is, was the Writ valid legal process from a court of competent jurisdiction? The Comptroller General, like the Air Force, merely looked at the garnishment order and seeing the word "court" pronounced it "valid on its face".

The Comptroller General's decision, it is noted, was decided after the Court of Claims had decided this case, Morton v. U.S. decided December 14, 1981 (P.App.62a).

The Comptroller General completely ignores the opinion of Court of Claims where an ample discussion of jurisdiction of courts of competent jurisdiction appears. Administrative agencies, such as the General Accounting Office, are bound by decisions of the Court of Claims as well as all other Federal Courts. Yet, in the Mathews case they completely ignored the court's decision and adopted the position of the Air Force in their losing cause. The legal conclusions of the Comptroller General are entitled to

no weight in this case in the face of a contra decision of the Court of Claims. This case does serve to point out the difficulties of a military member out of state.

After the final decision was reached by the U.S. Court of Appeals for the Federal Circuit in the case at bar on May 17, 1983, (P.App. 1a), the government promulgated a new set of regulations which was published in the Federal Register, Vol. 48, No.110, Tuesday, June 7, 1983. According to the said publication "This revision expressly provides that agencies will not be required to ascertain whether the court or other authority which issued the garnishment order had obtained personal jurisdiction over the obligor prior to its issuance of the order." And, "Two Federal agencies submitted comments concerning the amendment to 5 CFS 581.305(f), which states that when a governmental entity receives legal process that appears to conform

to the laws of the jurisdiction from which it was issued, the entity shall not be required to ascertain whether the authority which issued the legal process had obtained personal jurisdiction over the obligor.

The amendment is consistent with the position that the government has taken in litigation concerning the issue." (Emphasis added). This amendment to the regulations which was promulgated after the final decision in this case is the one cited by the government in its Petition (P.App.99a,100a, 101a,102a). The government doesn't mention the fact that the regulations it puts in its Appendix were not the regulations as they read at the time this case was decided. So, it can only be assumed the government is trying to apply after the fact amendments retroactively to this case. This would hardly meet the requirement of fair play which is embodied in substantive due process.

The government's position concerning 42 U.S.C. 659 and particularly so in view of the 1983 amendments to the regulations, would authorize the taking of property without due process of law. Consequently, the entire system of garnishment of Federal employees' pay for arrearages in spousal and child support might very well fail to meet the constitutional test. The Appeals Court was correct in holding that a court should construe legislative enactments to avoid constitutional difficulties, if possible. U.S.v. Clark, 455 U.S.23, 34 (1980); U.S. v. Harris, 347 U.S. 612, 618 (1954); Blasecki v. City of Durham, 456 F.2d 89, 93, cert.denied 409 U.S. 912 (1972).

What the government is attempting to do by its 1983 revisions of the regulations, is to expand immunity contrary to that set forth in 42 U.S.C. 659(f). The government by regulation cannot change the definitions in the statute of alimony, child support,

nor the defined "legal obligations", which must exist pursuant to a decree, order, or judgment issued in accordance with applicable state law by a "court of competent jurisdiction." As we have seen, Alabama had no "long-arm" statute for alimony and child support when the Alabama court attempted to exercise in personam jurisdiction over Col. Morton in Alaska. A regulation cannot expand a statute beyond its clear words. To attempt to do so is not implementation of the statute but an attempt to legislate by the executive branch of the government. The July, 1983, regulations setting forth total immunity have expanded the qualified immunity set forth in the statute as amended in 1977.

The government attaches as Appendix 104a, a Memorandum Opinion in the appellate court of Rush v. United States, U.S. Supreme Court No. 83-382, without stating any of the relevant factual situation. This is most misleading. In truth, in the underlying

case on which garnishment was predicated, Mr. Rush was the plaintiff in the Florida court, pursued the action with vigor, and was represented by counsel. Mr. Rush thereby subjected himself to the jurisdiction of the Florida court, quite contrary to the factual situation in the case at bar. Col. Morton was not and never has been subject to the jurisdiction of the Alabama courts or law.

When Mr. Rush appeared in the Florida court he had a full opportunity to contest any jurisdictional issues in that court and the decree is not void and not subject to attack on jurisdictional grounds.

Johnson v. Muelberger, S.Ct.of U.S.(1951) 340 U.S. 581. Sherrer v. Sherrer, U.S.S.Ct. (1948), 334 U.S. 343. The matters of which Mr. Rush now complains are alleged errors within the Florida case itself after the court had jurisdiction over him. Such a judgment is not void but merely voidable

by the court that issued it upon application to such court. Even though there may have been grave irregularities within the Rush case itself, he cannot collaterally attack the judgment. It is now res judicata on all points that he could have raised in that proceeding as well as on appeal, because the Florida court had in personam jurisdiction over him. Once a court has in personam jurisdiction over a party in a divorce suit, such jurisdiction continues over the parties to carry out its orders in the same suit. Michigan Trust Co. v. Ferry, 228 U.S. 346 (1913); Sheffield v. Sheffield, 114 S.E.2d 771 (1966). The Rush case has no application to the case at bar.

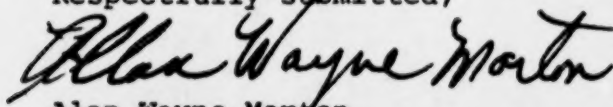
Although it was not argued in this case in the court below, it must be noted in passing that Virginia's garnishment procedure was held unconstitutional by the United States District Court for the Western District of Virginia, Charlottesville

Division in the case of Harris v. Bailey, Civil Action No. 81-0001-C on November 15, 1983, for Virginia's failure to provide for post-judgment notice and a hearing before garnishment of property. Alabama statutes, like Virginia's did not provide for a post-judgment notice and hearing before garnishing funds.

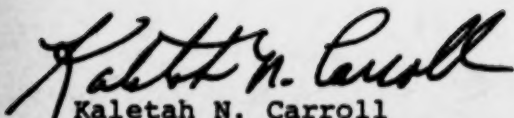
CONCLUSION

Wherefore the Respondent, Alan Wayne Morton, by Counsel, prays that this Honorable Court deny the Petition for Certiorari filed by the United States.

Respectfully submitted,




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by Counsel



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CERTIFICATE OF SERVICE

I hereby certify, under penalty of perjury, that on the 28th day of December, 1983, I mailed a typewritten copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit, to the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, postage prepaid and properly addressed.


Kaletah N. Carroll

RESPONDENT'S

APPENDIX A

1. 37 U.S.C. 204 in relevant part reads:

Entitlement:

a) Except for members covered by section 202(i) of this title, the following persons are entitled to the basic pay of the pay grade to which assigned or distributed, in accordance with their years of service computed under section 205 of this title -

1) a member of a uniformed service who is on active duty....

2. Fifth Amendment to the Constitution of the United States provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger; nor shall any person be

subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. 42 U.S.C. 659 as initially enacted read:

"Notwithstanding any other provision of law, effective January 1, 1975, moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States (including any agency or instrumentality thereof and any wholly owned Federal Corporation) to any individual, including members of the Armed Services, shall be subject, in like manner and to the same extent as if the United States were a private person, to legal process brought for the enforcement, against such individual of his legal obligations

to provide child support or make alimony payments. (Emphasis added).

4. The section of the Department of Defense Pay Manual in effect in 1975 reads as follows:

"a) Authority. Under the provisions of Pub.L.93-647, effective January 1, 1975, monies due from, or payable by, the United States to active duty members, members of the Reserve components not on active duty, and retired members (including members of Fleet Reserve and Fleet Marine Corps Reserves) are subject to court ordered garnishment or attachment when such members have been ordered by a court of competent jurisdiction (state or federal) to provide child support or alimony..." (Emphasis added).

5. 42 U.S.C.662 reads as follows:

'Definition'. For the purposes of Section 659 of this title -

(a)....

(b) The term 'child support', when used in reference to the legal obligations of an individual to provide such support, means periodic payments of funds for the support and maintenance of a child or children with respect to which such individual has such an obligation, and (subject to and in accordance with state law) includes but is not limited to, payments to provide for health care, education, recreation, clothing or to meet other specific needs of such child or children; such term also includes attorney's fees, interest, and Court costs, when and to the extent that the same are expressly recoverable as such pursuant to a decree, order, or judgment issued in accordance with applicable state laws by a Court of competent jurisdiction. (Emphasis added).

(c) The term 'alimony', when used in reference to the legal obligations of an individual to provide the same, means

periodic payments of funds for the support and maintenance of the spouse (or former spouse) of such individual, and (subject to and in accordance with State law) includes but is not limited to, separate maintenance, alimony pendente lite, maintenance and spousal support, such term also includes attorney's fees, interest, and Court costs when and to the extent that the same are expressly made recoverable as such pursuant to a decree, order or judgment issued in accordance with applicable State law by a Court of competent jurisdiction..." (Emphasis added).

6. Alabama Rules of Civil Procedure, Rule 4, Process (b), B, B, in effect in 1974 read in pertinent part:

(B) Any non-resident person, firm, partnership general or limited, or any corporation not qualified under the Constitution and laws of this state as to doing business herein who shall do any business or perform any character of work or service in this state

shall by the doing of such business or the performance of such work, or services, be deemed to have appointed the Secretary of State, or his successor or successors in office, to be the true and lawful attorney or agent of such non-resident, upon whom process may be served in any action accrued, accruing, or resulting from the doing of such business, or the performing of such work or service or relating to or as an incident thereof, by any such non-resident, or his, its or their agent, servant or employee...."

(C) Any non-resident who operates a motor vehicle on a public highway in this state, or who owns a motor vehicle operated on a public highway in this state by such non-resident, or his, their or its agent, provided that the authority of the Secretary of State to receive service of process for such non-resident shall be limited to process in actions against such non-

residents growing out of any accident or collision in which such non-resident, or the motor vehicle owned by such non-resident, shall be involved while being operated on a public highway of this state and provided further that this provision shall not apply to any foreign corporation that is qualified under the Constitution and laws of this state as to doing business herein, and has designated and has and is maintaining at such time an authorized agent or agents residing in this state upon whom service can be had."

7. Alabama Rules of Civil Procedure, Rule 4, Process (c)(1)(B) in 1973 for divorce read as follows:

(c) Substituted Service. One or more methods of substituted service is provided for under these rules and the laws of this state including, but not limited to, the following proceedings and occasions and all such statutes remain in effect whether

or not set out herein.

(1) Statutes

... (B) Divorce. In actions involving divorce, service may be made as provided in Tit. 34 § 23, Code of Ala."

8. 15 U.S.C.1673, reads as follows:

"§1673. Restriction on garnishment

Exceptions

(b) (1) The restrictions of subsection (a) of this section do not apply in the case of

(A) any order for the support of any person issued by a court of competent jurisdiction or in accordance with an administrative procedure, which is established by State law, which affords substantial due process, and which is subject to judicial review..."

9. 10 U.S.C. 1408 reads in pertinent part as follows:

(a) In this section:

"(1) 'Court' means --

(A) any court of competent jurisdiction of any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands:

"B) any court of the United States (as defined in section 451 of title 28) having competent jurisdiction; and

"C) any court of competent jurisdiction of a foreign country with which the United States has an agreement requiring the United States to honor any court order of such country.

"(2) 'Court order' means a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or

legal separation, or a court ordered, ratified, or approved property settlement incident to such previously issued decree], which -

(A) is issued in accordance with the laws of the jurisdiction of that court;

(B) provides for -

"(i) payment of child support (as defined in section 462(b) of the Social Security Act (42 U.S.C.662(b)))";

"(ii) payment of alimony (as defined in section 462(c) of the Social Security Act (42 U.S.C.662(c)))";...

"(D) The court order or other documents served with the court order certify that the rights of the member under the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U.S.C.App.501 et seq.) were observed; and

"(2) a court order is regular on its face if the order -

"(A) is issued by a court of competent jurisdiction;

"(B) is legal in form; and

"(C) includes nothing on its face that provides reasonable notice that it is issued without authority of law...."

10. Virginia Code Sec.20-97 reads in pertinent fact, as follows:

Domicile and residential requirements for such suits:- No suit for annulling a marriage or for divorce shall be maintainable, unless one of the parties is domiciled in, and is and has been an actual bona fide resident of this State for at least six months preceding the commencement of the suit; nor shall any suit for affirming a marriage be maintainable, unless one of the parties be domiciled in, and is and has been an actual bona fide resident of this State at the time of bringing such a suit. For the purposes of this section only, if a member of the armed forces of the United States

has been stationed in this State and has lived with his or her spouse for a period of six months or more in this State next preceding a separation between such parties, and such service person or spouse continue to live in this State until and at the time a suit for divorce or legal separation is commenced, then such person and his or her spouse shall be presumed to be domiciled in and to have been a bona fide resident of this State during such period of time...."

No. 83-916

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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

ALLAN WAYNE MORTON

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the federal government may be held liable for reimbursement when it has, pursuant to 42 U.S.C. (Supp. V) 659, honored a facially valid writ of garnishment issued by a state court to collect alimony or child support owed by a federal employee, if a federal court later holds that the state court that issued the underlying judgment lacked personal jurisdiction over the employee.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-916

UNITED STATES OF AMERICA, PETITIONER

v.

ALLAN WAYNE MORTON

*ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-60a) is reported at 708 F.2d 680. The opinion of the Claims Court (Pet. App. 62a-95a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 1983. A timely petition for rehearing was denied on July 5, 1983 (Pet. App. 61a). On September 26, 1983, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 2, 1983. The petition was filed on that date and was granted on January 23, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of the Social Security Act, 42 U.S.C. (Supp. V) 659 *et seq.*, and the pertinent parts of the implementing regulations, 5 C.F.R. Pt. 581, as amended by 48 Fed. Reg. 26279-26294 (1983), are set forth in the appendix to this brief.

STATEMENT

1. Prior to 1974, the sovereign immunity of the United States barred writs garnishing the salaries of federal employees. See *FHA v. Burr*, 309 U.S. 242, 244 (1940); *Buchanan v. Alexander*, 45 U.S. (4 How.) 19, 20 (1846). In 1974, as one of several measures taken to facilitate the collection of alimony and child support, Congress enacted 42 U.S.C. 659,¹ which partially waived sovereign immunity and allowed garnishment of federal salaries to collect alimony and child support payments "in like manner and to the same extent as if the United States * * * were a private person." 42 U.S.C. (Supp. V) 659(a). However, under 42 U.S.C. (Supp. V) 659(f), which was added in 1977,² neither the government nor its disbursing officers may be held liable for amounts paid pursuant to legal process regular on its face, if such payment is made in accordance with this section and the regulations issued to carry out this section." The term "legal process" is defined by statute as "any writ * * * or other similar process in the nature of

¹ Section 659 was originally enacted as part of the Social Services Amendments of 1974, Pub. L. No. 93-647, § 101(a), 88 Stat. 2357. The section was amended in 1977 and is now codified as 42 U.S.C. (Supp. V) 659(a).

² Tax Reduction and Simplification Act of 1977, Pub. L. No. 95-30, Tit. V, § 501(a), 91 Stat. 157.

garnishment" that, among other things, "is issued by * * * a court of competent jurisdiction" (42 U.S.C. (Supp. V) 662(e)(1)).

Pursuant to 42 U.S.C. (Supp. V) 661, the Office of Personnel Management has issued regulations implementing Section 659. See 5 C.F.R. Pt. 581, as amended by 48 Fed. Reg. 26279-26294 (1983). These regulations provide that federal disbursing agents must comply with a writ of garnishment except in certain enumerated circumstances, such as where there are jurisdictional defects apparent "on its face" or where the garnishment is not for alimony or child support. 5 C.F.R. 581.305(a)(1).

2. Respondent, a career Air Force officer, was sued for divorce in Alabama. Served by mail while stationed in Alaska, he failed to make an appearance in the Alabama suit on the advice of counsel that such service was insufficient.³ On August 14, 1975, the Alabama court entered a default judgment granting the divorce and ordering him to pay alimony and child support. Subsequently, to enforce that judgment, Mrs. Morton obtained a writ of garnishment against respondent's federal pay. The writ, issued by the Register of the Tenth Judicial Circuit Court of Alabama, was on the "regular form" used in that State (Pet. App. 90a). Attached to the writ was a copy of the final judgment of divorce, which recited, *inter alia*: "It appearing of record in this cause that the defendant was duly served and failed to appear * * *" (*id.* at 38a (affidavit of James R. Russell)).

The Air Force Finance Office at Elmendorf Air Base in Alaska received the writ on December 27,

³ Respondent was advised by an officer of the Air Force Judge Advocate General's office (Pet. App. 3a-4a).

1976, and promptly notified respondent (see 42 U.S.C. (Supp. V) 659(d)). Respondent, after seeking the advice of counsel, protested that his pay could not be garnished because he had not been served properly in the underlying state court proceeding and because he was neither a resident nor a domiciliary of Alabama (Pet. App. 4a, 37a-39a).⁴ However, because the Alabama writ was "regular on its face," the Air Force filed an answer in the Tenth Judicial Circuit Court, confessing indebtedness of \$4,100 to respondent, and later began making deductions from respondent's salary for payment to the court.⁵ Other subsequent garnishment writs were likewise honored. Pet. App. 4a, 67a, 91a.

Several months later, respondent successfully sued in the former Court of Claims for recovery of this money, arguing that the Alabama court had lacked in personam jurisdiction (see Pet. App. 68a-95a). The trial judge concluded that "the Air Force Finance Office acted arbitrarily and illegally when it ignored [respondent's] protest that the Alabama court did not have jurisdiction to enter a money judgment against him for alimony and child support, made deductions from [respondent's] pay, and paid the money over to" the state court (*id.* at 81a).

3. A divided panel of the United States Court of Appeals for the Federal Circuit affirmed (Pet. App.

⁴ Respondent also claimed that he had already paid the obligation (Pet. App. 4a, 39a, 91a).

⁵ Because the disbursing officer was under threat of personal suit, he contacted the United States Attorney in Birmingham, Alabama to ask whether service of process by registered mail was sufficient under Alabama law. The United States Attorney answered affirmatively. Pet. App. 40a.

1a-60a).⁶ The court of appeals noted that the government is immune from suit under 42 U.S.C. (Supp. V) 659(f) only if payment is made "pursuant to legal process regular on its face" (Pet. App. 5a-7a). The court observed that "legal process" is defined by 42 U.S.C. 662(e)(1) as process "issued by * * * a court of competent jurisdiction," and interpreted "competent jurisdiction" to encompass personal as well as subject matter jurisdiction (Pet. App. 3a-11a). The court then determined that respondent's contacts with Alabama were insufficient to permit the courts of that State to exercise personal jurisdiction over him (see *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945)), and thus that the Alabama court was not "a court of competent jurisdiction."

The court of appeals therefore concluded that the State's garnishment writ was not "legal process" within the meaning of 42 U.S.C. (Supp. V) 659 and 662(e)(1) (Pet. App. 11a-18a).⁷ It stated that "[t]o

⁶ Because this case was pending in the Court of Claims on October 1, 1982, jurisdiction over it was transferred to the newly created United States Court of Appeals for the Federal Circuit pursuant to Pub. L. No. 97-164, § 403, 96 Stat. 57. Thus, the absence of a final decision of the Claims Court or Court of Claims, within the meaning of Pub. L. No. 97-164, § 127(a), 96 Stat. 37, to be codified at 28 U.S.C. 1295(3), did not affect the jurisdiction of the court of appeals.

⁷ The court of appeals also suggested (Pet. App. 8a) that alimony or child support orders entered by a court without personal jurisdiction over the defendant are not "legal obligations" under Section 659(a), which waives sovereign immunity for garnishment writs "for the enforcement, against such individual of his legal obligations to provide child support or make alimony payments."

hold otherwise and to require * * * [respondent], a resident of Alaska, to proceed in the Alabama state court against [his former wife] would, in effect, render those statutes violative of constitutional due process" (*id.* at 17a). The court also stated (*ibid.* (footnotes omitted)) :

[W]e hold that the immunity provisions of the garnishment statute permit the Government, where the process document is regular on its face, to make payment without liability on a presumption that the underlying judgment is valid, but that such a presumption is rebuttable by a showing that the Government had notice of a substantial claim of jurisdictional irregularity.

The court found that the government had such notice here and was consequently liable to respondent for the amount withheld from his salary pursuant to the writ (*id.* at 17a-18a).

Judge Nies dissented (Pet. App. 20a-55a). She concluded that a private employer would not be liable to respondent under the circumstances of this case (*id.* at 21a-31a) and that the government was, in any event, immune from respondent's suit under Section 659(f) because the garnishment writ was "regular on its face" (Pet. App. 33a-36a). Judge Nies added (*id.* at 47a) :

The majority decision will create chaos in how the Government must operate in the thousands of garnishments it faces daily. It must either pay twice, or where permitted by a state court, litigate for any employee who raises a "substantial claim of jurisdictional irregularity" regardless of the regularity of the process "on its face."

SUMMARY OF ARGUMENT

The federal garnishment statute, 42 U.S.C. (Supp. V) 659, subjects the federal government to garnishment writs for the enforcement of child support and alimony obligations "in like manner and to the same extent" as if it were a private person. The statute expressly insulates the government from liability for a payment made "pursuant to legal process regular on its face, if such payment is made in accordance with this section and the regulations issued to carry out this section." Despite these provisions, the court of appeals held the United States liable to respondent for payments made to respondent's former wife and children, pursuant to an Alabama state court garnishment writ that was regular on its face, on the ground that the state court that issued the underlying divorce decree and awarded alimony and child support lacked personal jurisdiction over respondent. The court of appeals' holding is clearly wrong and leads to unreasonable results.

A. The decision below conflicts with the plain language of the statute.

1. Although Section 659(a) subjects the government to garnishment writs "in like manner and to the same extent" as a private party, the court of appeals' decision would impose on the government far greater liability and responsibility for legal investigation, analysis, and litigation than is borne by private garnishees. Indeed, many state statutes, including that of Alabama, expressly insulate garnishees from liability under circumstances such as those here. A garnishee is obligated, at most, to notify the principal debtor of the action if he is not otherwise notified, to answer the state court summons, to state whether the garnishee owes money or property to the principal

debtor and, if so, the amount, and to comply with the writ of garnishment if it issues. As a mere stakeholder, the garnishee is not required to litigate on behalf of the principal debtor on issues (even jurisdictional issues) relating to the underlying obligation. Nor is the garnishee, as a private party, empowered to second-guess the jurisdictional holdings of the state court or to "refuse[] to honor" its process, as the court of appeals would require (Pet. App. 19a n.14).

2. Section 659(f) unequivocally provides that the federal government is not liable for payments made "pursuant to legal process regular on its face," and Section 662(e) (1) defines legal process to require issuance by "a court of competent jurisdiction." Although the court of appeals did not dispute that the Alabama state court garnishment writ was "regular on its face," it concluded that the immunity provision of Section 659(f) did not apply because there was no personal jurisdiction over respondent in the underlying divorce suit.

In context, however, the term "legal process regular on its face" cannot sensibly be interpreted to require an inquiry into the personal jurisdiction of the court that entered the judgment sought to be enforced by garnishment. Such an interpretation, in addition to distorting the usual meaning of the term "competent jurisdiction," would effectively read the qualifying term "regular on its face" out of the statute. In any event, the court of appeals' approach, permitting the government to comply with writs in the absence of notice of a "substantial claim of jurisdictional irregularity" (Pet. App. 17a (footnote omitted)), is supported by no possible reading of the statute.

3. The court of appeals' decision cannot be defended as necessary to protect respondent's due pro-

cess rights. Respondent received actual notice of the divorce suit and of the garnishment proceeding and had full opportunity to enter a special appearance to challenge the state court's jurisdiction. Having failed to do so, he can hardly claim that due process now entitles him to shift his losses to his employer.

B. Regulations authorized by Congress to implement Section 659 remove all discretion from federal disbursing officers to refuse to honor garnishment writs on the ground of asserted latent jurisdictional defects. The court of appeals disregarded these regulations, despite their intended "legislative effect." *Schweiker v. Gray Panthers*, 453 U.S. 34, 44 (1981).

C. The decision below is manifestly contrary to congressional intent. The purpose of the federal garnishment statute is to provide a means for expeditious enforcement of alimony and child support judgments against federal employees and retirees. Congress intended prompt compliance with state court garnishment writs that are regular on their face, without further legal obstacles. Yet the court of appeals would require extensive and time-consuming investigation for latent defects in the writ in all cases of an asserted "substantial claim of jurisdictional irregularity" (Pet. App. 17a (footnote omitted)).

The alternative courses of action potentially available to the government after investigation—to refuse to honor the writ, to litigate against the dependent spouse or children, or to institute interpleader litigation against the principal debtor and the spouse or children—would run directly counter to achievement of the statutory objectives. Moreover, requiring the federal government to "pay twice"—once to the spouse and a second time to the employee—if a court subsequently finds the prior garnishment writ defec-

tive would be unfair to federal taxpayers and contrary to principles of sovereign immunity in the absence of any indication that Congress was aware of, or intended to assume, such liability.

ARGUMENT

THE FEDERAL GOVERNMENT MAY NOT BE HELD LIABLE FOR REIMBURSEMENT WHEN IT HAS, PURSUANT TO 42 U.S.C. (SUPP. V) 659, HONORED A FACIALLY VALID WRIT OF GARNISHMENT

In the underlying dispute between respondent and his former wife and children, the United States is but a stakeholder. Congress has directed the federal government to honor state court writs of garnishment for alimony or child support and expressly immunized the government and its disbursing agents from liability for amounts paid "pursuant to legal process regular on its face, if such payment is made in accordance with this section and the regulations issued to carry out this section" (42 U.S.C. (Supp. V) 659(f)). Inevitably, some writs received by the federal government will be legally defective or challengeable, especially given the confused and conflicting assertions of jurisdiction typical in cross-state marital disputes among transient spouses. Yet the government and its agents are not required to intervene in the underlying litigation on behalf of either party, to investigate the legal merits of any defense the employee may have, to make legal judgments about the validity of facially valid state court orders, to file interpleader actions, or to subject themselves to state contempt proceedings or default judgments in order to challenge the validity of the writ. Congress has permitted the government to rely on the *facial* validity of the writ. The burden of legal research, in-

vestigation, and litigation must be borne by the employee involved.*

The court of appeals adopted a different approach. It would require the federal government to shoulder the burden of challenging the state court order, provided that the employee has given the disbursing officers notice of a possible defect in personal jurisdiction. This places an unmanageable burden on the government; in many instances, it will draw the government into marital disputes and cause the government to oppose the alimony and child support claims of former spouses and children. In addition, where the government has not taken adequate steps to challenge the validity of the garnishment writ, the decision below will require it to "pay twice"—once to the spouse and children, and a second time to the employee. Absent any indication that Congress intended these consequences, the statute should not be interpreted to lead to so unreasonable a result.

* We therefore have not challenged before this Court the court of appeals' holding that the Alabama court that issued the writ of garnishment here lacked personal jurisdiction, even though that holding is of questionable validity. See *Orrox Corp. v. Orr*, 364 So.2d 1170 (Ala. 1978); *Taylor v. Taylor*, 44 Ill.2d 139, 254 N.E.2d 445 (1969); *McGlothen v. Superior Court*, 121 Cal. App. 3d 106, 175 Cal. Rptr. 129 (1981). If our position on the interpretation of Section 659 is correct, then disputes concerning personal jurisdiction in alimony and child support cases will be resolved not by the Federal Circuit in suits by one party against the United States, but in state courts in suits involving both of the actual parties in interest. See *Jizmerjian v. Department of Air Force*, 457 F. Supp. 820, 824 (D.S.C. 1978), *aff'd*, 607 F.2d 1001 (4th Cir. 1979), *cert. denied*, 444 U.S. 1082 (1980); *Cunningham v. Department of Navy*, 455 F. Supp. 1370, 1372 (D. Conn. 1978).

**A. The Language Of The Garnishment Statute Precludes
A Finding Of Liability Against The Government
Where It Has Performed The Usual Duties Of A
Garnishee And The Writ Was Regular On Its Face**

The court of appeals' analysis is purportedly based upon the language of 42 U.S.C. (Supp. V) 659, but no fair reading of the statute supports its conclusion. We submit that the decision below is precluded both by Section 659(a), the provision as originally enacted in 1974, and by Section 659(f), which was added by amendment in 1977 to clarify the original intent.

1. Section 659(a) provides that wage and salary entitlements of employees of the United States shall be subject to legal process brought for the enforcement of alimony or child support "in like manner and to the same extent as if the United States * * * were a private person" (42 U.S.C. (Supp. V) 659(a)). As Judge Nies pointed out in dissent (Pet. App. 21a-28a), a private employer garnishee in Alabama, as in most other states, would be discharged from liability to an employee defendant under the circumstances of this case. See Ala. Code § 6-6-461 (1977).

The court of appeals' interpretation would subject the federal government to far greater liability and responsibility for legal investigation, analysis, and litigation than is borne by private garnishees. Many state statutes expressly insulate garnishees from liability under circumstances such as those present here. Alabama law provides that "[t]he judgment condemning the debt, demands, money or effects to the satisfaction of the plaintiff's demand is conclusive as between the garnishee and the defendant to the extent of such judgment, unless the defendant prosecutes to effect an appeal from such judgment" (Ala. Code § 6-6-461 (1977)). California law even more explicitly

provides (Cal. Civ. Proc. Code § 706.154(b) (West Cum. Supp. 1984)) that "an employer who complies with any written order or written notice which purports to be given or served in accordance with the provisions of this chapter [on garnishment] is not subject to any civil or criminal liability for such compliance unless the employer has actively participated in a fraud." Similarly, New York law (N.Y. Civ. Prac. Law § 5209 (McKinney 1978)) states:

A person who, pursuant to an execution or order, pays or delivers, to the judgment creditor or a sheriff or receiver, money or other personal property in which a judgment debtor has or will have an interest, or so pays a debt he owes the judgment debtor, is discharged from his obligation to the judgment debtor to the extent of the payment or delivery.^[9]

* To similar effect are: Alaska Stat. § 09.40.040 (1983); Ariz. Rev. Stat. Ann. § 12-1592 (1982); Ark. Stat. Ann. § 31-146 (repl. 1962); Conn. Gen. Stat. Ann. § 52-344 (West 1960); D.C. Code Ann. § 16-573(c) (1981); Idaho Code § 8-510 (1979); Ill. Ann. Stat. ch. 62, § 44 (Smith-Hurd 1972); Ind. Code Ann. § 34-1-11-29 (Burns 1973); Iowa Code Ann. § 642.18 (West 1950); Md. Cts. & Jud. Proc. Code Ann. § 11-601(a) (repl. 1980); Mass. Ann. Laws ch. 246, § 43 (Michie/Law. Coop. 1974); Mich. Stat. Ann. § 27A.4061 (Callaghan rev. 1980) (applicable to garnishments against state); Minn. Stat. Ann. § 571.54 (West 1947); Miss. Code Ann. § 11-35-37 (1972); Mo. Ann. Stat. § 525.070 (Vernon 1953); N.H. Rev. Stat. Ann. § 512:38 (repl. 1983); N.J. Stat. Ann. § 2A:17-53 (West Cum. Supp. 1983) (applicable to garnishments against state and local governmental entities); N.D. Cent. Code § 32-09.1-15 (repl. Supp. 1983); Ohio Rev. Code Ann. § 2716.21(D) (Page Supp. 1982); Okla. Stat. Ann. tit. 12, § 1233 (West 1961); Or. Rev. Stat. § 29.195 (1981); S.D. Codified Laws Ann. §§ 21-18-32, 21-18-48 (rev. 1979); Tenn. Code Ann. § 29-7-117 (repl. 1980); Vt. Stat. Ann. tit. 12, § 3081 (1973);

The obligations of a garnishee typically are, at most, to notify the principal debtor, to answer the state court's summons, to state whether he owes money or property to the principal debtor and, if so, the amount, and to comply with the writ of garnishment. This Court noted in *Harris v. Balk*, 198 U.S. 215, 226-228 (1905),¹⁰ that a garnishee cannot be compelled to reimburse the principal debtor for payment under compulsion of a garnishment proceeding,¹¹ unless the garnishee negligently failed in his duty to give notice to the principal debtor. The purpose of the notice, the Court remarked, is to give the principal debtor himself the "opportunity to defend the claim made against him in the attachment suit" (*id.* at 227). No further obligation is placed on the garnishee: he is not required to take sides in the underlying litigation and need not file a separate interpleader action to protect himself from inconsistent judgments. As between the garnishee and the principal debtor, the debt is discharged by the garnishee's payment to the court in compliance with the writ. See, e.g., *Agnew v. Cronin*, 148 Cal. App. 2d 117, 306 P.2d 527 (1957) (garnishee is liable for failure to notify principal debtor of garnishment; no duty imposed beyond providing notice).

Wash. Rev. Code Ann. § 7.32.300 (1961); W. Va. Code § 38-7-25 (1966); Wis. Stat. Ann. § 812.16(2) (West 1977); Wyo. Stat. Ann. § 1-15-302 (1977).

¹⁰ This portion of the holding in *Harris v. Balk*, *supra*, was not affected by *Shaffer v. Heitner*, 433 U.S. 186 (1977).

¹¹ In order to constitute a defense to a claim for reimbursement, this Court stated, the payment must have been made "under a valid judgment against [the garnishee]" (198 U.S. at 226). There is no requirement that the underlying judgment be valid as to the principal debtor.

The court of appeals, relying on 38 C.J.S. *Garnishment* §§ 244 and 311 (1943) and cases cited therein, stated that "a valid judgment against the defendant is essential to the validity of a judgment against the garnishee" (Pet. App. 11a n.5). However, this principle has application only in the context of a defense by the garnishee in the garnishment action, or by the principal debtor in litigation against the plaintiff. See, e.g., *Chiaro v. Lemberis*, 28 Ill. App. 2d 164, 171 N.E.2d 81 (1960). It does not apply to the prejudice of a third party stakeholder. Neither the court of appeals nor the relevant sections of C.J.S. cite any case in which this principle has been applied as a basis for imposing a second liability on the garnishee in an action by the principal debtor, at least where the garnishee had notified the principal debtor of the garnishment proceeding.¹² Indeed, 38 C.J.S. *Garnishment* § 293(e) (2) (1943) (footnote omitted) states that "where a garnishee notified defendant to attend and make defense if he had any, a judgment against the garnishee will protect him, although he failed to defend on the ground of irregularity in the garnishment proceedings."

This follows from the status of the garnishee as a stakeholder in the action. The garnishee is summoned to court in the garnishment action and compelled to answer whether he owes money to or holds property of the principal debtor. Upon answer, and

¹² *Betts v. Coltes*, 467 F. Supp. 544 (D. Hawaii 1979), the only case cited by the court of appeals (Pet. App. 11a n.5), actually supports our view. There, the court stated that the principal debtor could recover monies erroneously paid by a garnishee to a judgment creditor *from the creditor*. Only in instances of misuse of process or failure to correct an erroneous garnishment, not relevant here, could the principal debtor recover damages from the garnishee.

if so ordered by the court, the garnishee is required to deposit the money or other property belonging to the principal debtor into the registry of the court. It would be manifestly unfair to require the garnishee to shoulder the burden of litigation on behalf of the principal debtor, where the latter has notice of the proceeding and chooses not to avail himself of the opportunity to appear to defend his interests, and likewise unfair to require the garnishee to pay twice in the event the underlying judgment is found to have a jurisdictional defect not apparent on the face of the process.

The equities of the matter were cogently set forth a century ago in *City of New Bedford*, 20 F. 57 (S.D.N.Y. 1884), a case remarkably similar to this one. There, as here, an employee was sued by a creditor (Blake) in state court, in a proceeding he deemed void for want of personal jurisdiction. The employee "had full actual notice of the suit on the day when it was instituted" (*id.* at 60), but "[i]nstead of assuming the defense of that suit, if he had any defense, he left the [garnishees] to defend as [they] could" (*id.* at 61). After the garnishees had been compelled to pay his debts, the employee repaired to federal court where he sued the garnishees under the admiralty jurisdiction¹³ and asked the court "to require the defendants [the garnishees] to pay that part over again" (*id.* at 60-61). The court, even though expressly holding that the underlying judgment was void for want of jurisdiction (*id.* at 60), held in favor of the defendant garnishees (*id.* at 61):

¹³ The employee, a seaman, brought suit by libelling the vessel owned by his employers.

[H]ere the payment by the defendants has been already made, and made compulsorily under a power which they could not resist. The [employee's] debt to Blake has been thereby extinguished. * * * He has had the full benefit of the defendants' payment of it. These are all accomplished facts; and in the absence of any proved circumstances of hardship to the [employee], there is manifestly no equity in his claim to be paid, in substance, a second time; and such a decree would inflict a manifest wrong upon the defendants.

See *Harris v. Balk*, 198 U.S. at 226 ("It ought to be and it is the object of courts to prevent the payment of any debt twice over)."¹⁴ See also *Oppenheimer v. Dresdner Bank A.G.*, 50 A.D.2d 434, 377 N.Y.S.2d 625 (1975), *aff'd*, 41 N.Y.2d 949, 363 N.E.2d 358 (1977); *Savepex Sales Co. v. M.S. Kaplan Co.*, 103 Ill. App. 2d 481, 243 N.E.2d 608 (1968); *Agnew v. Cronin*, *supra*; *Steltzer v. Chicago, M. & St. P. Ry.*, 156 Iowa 1, 134 N.W. 573 (1912); *cf. Vanasse v. Labrecque*, 381 A.2d 269 (Me. 1977).

We do not challenge the oft-cited proposition (Annot., 49 A.L.R. 1411 (1927) (emphasis added)) that "if the judgment in a garnishment proceeding is void, as, for example, where there is no jurisdiction acquired by the court, payment by the garnishee is no

¹⁴ As this Court commented in *Chicago, R.I. & P. Ry. v. Sturm*, 174 U.S. 710, 713 (1899): "How proceedings in garnishment may be availed of in defence [by the garnishee] * * * the practice of the States of the Union is not uniform. But it is obvious and necessary justice that such proceedings should be allowed as a defence in some way." See also *Huron Holding Corp. v. Lincoln Mine Operating Co.*, 312 U.S. 183, 189, 194 (1941).

protection to him against a subsequent action by his creditor, or the creditor's assignee, to recover the debt." See, e.g., *Alabama Great Southern R.R. v. Chumley*, 92 Ala. 317, 9 So. 286 (1890).¹⁵ It imposes no unreasonable burden on the garnishee to ensure that the garnishment action to which he is a party is proper. Here, for example, there is no doubt that the Alabama court had both subject matter and personal jurisdiction in the garnishment suit by Mrs. Morton against the Air Force; the Air Force is present in Alabama for purposes of suit and has consented to suit by virtue of 42 U.S.C. (Supp. V) 659. It is quite another proposition to require the garnishee to second-guess the jurisdiction of the underlying proceeding, to which he was not a party, where the process served on the garnishee is fully regular on its face.

To be sure, some state courts have stated that garnishees may be held liable for reimbursement to the principal debtor where the underlying judgment was void. See, e.g., *Upper Blue Bench Irrigation Dist. v. Continental Nat'l Bank & Trust Co.*, 93 Utah

¹⁵ In *Chumley*, a Tennessee creditor obtained a valid judgment in Tennessee state court against Chumley, then a resident of Tennessee. After failure of execution, the creditor obtained a writ of garnishment in Tennessee state court against Chumley's employer, the railroad, an Alabama corporation. Since Tennessee then had no provision permitting service of process on out-of-state corporations except with respect to claims or property arising or located in the State, and since the wages owing to Chumley, who by then had moved to Alabama, were deemed to be situated in Alabama, the Tennessee court had no jurisdiction over the railroad in the garnishment action. Decisions following this pattern are easily distinguishable from the instant case, where there is no doubt that the Alabama court had jurisdiction over the Air Force in the garnishment action.

325, 72 P.2d 1048 (1937); *Czesna v. Lietuva Loan & Savings Ass'n*, 252 Ill. App. 612 (1929); *Roberts v. Hickory Camp Coal & Coke Co.*, 58 W. Va. 276, 52 S.E. 2d (1905); *Louisville & N. R.R. v. Nash*, 118 Ala. 477, 23 So. 825 (1897). But these are cases where the principal defendant had been given no actual notice of the action. In this case, by contrast, respondent, the principal debtor, had actual notice of the suit and an opportunity to contest jurisdiction. See page 3, *supra*.¹⁶ Moreover, the state statutes cited above would appear to preclude such liability in most instances.¹⁷ Indeed, the continued vitality of the doc-

¹⁶ As the dissenting opinion correctly observed (Pet. App. 27a n.4), the question of pre-judgment garnishments (where the garnishee's debt provides the jurisdictional basis for quasi in rem jurisdiction over the principal debtor) presents different issues from that of post-judgment garnishments. See N.Y. Civ. Prac. Law § 5209 (McKinney 1978) (Practice Commentary). In the wake of *Shaffer v. Heitner*, *supra*, and *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), the question of the effect on garnishees of jurisdictional defects in pre-judgment garnishment actions is of little practical significance. Cases such as *Cole v. Randall Park Holding Co.*, 201 Md. 616, 95 A.2d 273 (1958); *Riley v. State Bank of De Pere*, 269 N.W. 722 (Wis. 1936); and *Egnatik v. Riverview State Bank*, 114 Kan. 105, 216 P. 1100 (1923), are, therefore, not in point.

¹⁷ We have found only one decision, *O'Toole v. Helio Products, Inc.*, 17 Ill. App.2d 82, 149 N.E.2d 795 (1958), in which the court expressly considered one of the statutes cited and construed it as not applying where the underlying judgment was void for want of personal jurisdiction over the principal debtor, even though the principal debtor had been given notice. The dearth of reported decisions construing these statutes in situations similar to that in this case—which presents a common fact pattern—suggests that the plain language of the statutes has been followed without need for judicial construction.

trine that subsequent actions based on void judgments are themselves void is also in doubt. In some states under some circumstances, it was thought that a judgment based on an earlier judgment that was subsequently held void was itself automatically nullified, despite effects upon innocent third parties who had relied on it. As the new Restatement (Second) of Judgments makes clear, however, this is no longer the law (if it ever was). "The current doctrine," according to the Restatement, "is that the later judgment remains valid, but a party, upon a showing that the earlier judgment has been nullified and that relief from the later judgment is warranted, may by appropriate proceedings secure such relief." 1 Restatement (Second) of Judgments § 16 comment c 146 (1982). This enables a third party, such as a garnishee, to rely on a facially valid court order, while protecting the right of the defendant in the underlying suit to obtain prospective relief.

This view of the effect of a void judgment on ancillary judgments meshes precisely with the statutory and regulatory scheme of Section 659. The United States, as garnishee, is entitled to treat the state court garnishment writ—assuming it is regular on its face—as valid, and may rely upon it without fear that subsequent courts will conclude that the court issuing the writ erred as to the validity of the underlying judgment. The employee debtor is promptly notified of the garnishment and given an opportunity to undertake "appropriate proceedings [to] secure * * * relief" from the judgment. Under the implementing regulations, the government will not honor a garnishment writ in the event that such steps have been successfully completed. If a court of competent jurisdiction enjoins or suspends the opera-

tion of the garnishment writ, the disbursing agent is instructed not to comply with the garnishment (5 C.F.R. 581.305(a)(5)), and if notice is received that the employee debtor has appealed the underlying judgment, the agent is instructed (unless to do so would be inconsistent with applicable state law) to suspend payment of monies to the plaintiff in the garnishment action (5 C.F.R. 581.305(a)(6)). The employee debtor cannot, however, simply rest on his rights and expect the government, as garnishee, to make him whole after the fact. See *Calhoun v. United States*, 557 F.2d 401, 402 (4th Cir.), cert. denied, 434 U.S. 966 (1977).¹⁸

¹⁸ In *Calhoun*, a Navy officer sued to recover pay garnished to satisfy alimony and child support obligations, contending that the garnishment writ was void because the court that issued the underlying divorce judgment lacked personal jurisdiction over him. Observing that the divorce judgment was "facially valid," the court of appeals held (557 F.2d at 402) that "[t]he United States was under no duty to contest the judgment * * *. It was Calhoun's obligation to attack the judgment if he wished to avoid the deduction from his pay." See also *Overman v. United States*, 563 F.2d 1287 (8th Cir. 1977); *Snapp v. United States Postal Service*, 664 F.2d 1329 (5th Cir. 1982); *Cunningham v. Department of Navy*, 455 F. Supp. 1370 (D. Conn. 1978); *Popple v. United States*, 416 F. Supp. 1227 (W.D. N.Y. 1976) (holding that federal employees cannot sue to enjoin compliance with facially valid garnishment writs under Section 659).

The court below distinguished *Calhoun* on the patently irrelevant ground that its construction of Section 659(a) took place prior to the addition of Section 659(f) in 1977 (Pet. App. 10a). The 1977 amendments left the content of Section 659(a) unchanged (albeit renumbered) as it affects the federal government. As the Senate report accompanying the amendment plainly stated (S. Rep. 1350, 94th Cong., 2d Sess. 3 (1976)): "[i]t is not the purpose of the committee bill to make any major changes in the new child support law. The

Finally, even if currently prevailing state law did place private garnishees at their peril in complying with facially valid writs where the principal debtor was notified but failed to take steps to protect his rights, there is no reason to believe that Congress intended to subject the United States to such contingencies. Not only has the federal government traditionally been immune altogether from garnishment writs, but the administrative and financial burden on the government, by far the nation's largest employer, would far exceed that of any private garnishee. It is not likely that Congress would assume the substantial adverse consequences of such a holding without debate, reflection or explanation. And even if such an interpretation were possible under Section 659 as originally enacted, it is no longer credible under the 1977 amendment, as we show below.¹⁹

bill would make modifications, consistent with the original congressional intent, to clarify questions that have been raised [and] to provide for administrative improvement." See also Br. in Opp. 11. In any event, Section 659(f), which was added by the 1977 amendments, expressly immunizes the government from certain liability; it creates no new source of liability. We fail to understand how the addition of Section 659(f) could undermine the *Calhoun* court's conclusion that Section 659(a) did not itself give rise to liability.

¹⁹ There is no merit in the court of appeals' suggestion (Pet. App. 8a) that alimony or child support orders entered by a court without personal jurisdiction over the defendant do not fall within Section 659(a), which waives sovereign immunity for garnishment writs for the enforcement of "legal obligations" to furnish child support or pay alimony. As the implementing regulations provide (5 C.F.R. 581.102(g)), a "legal obligation" in this context is one that is "enforceable under appropriate State or local law." Here, the Alabama court enforced respondent's obligations by issuing the writ. Furthermore, the court of appeals' interpretation of the

2. Section 659(f), added by amendment in 1977,³⁰ unequivocally provides that neither the government nor its disbursing officers may be held liable for a payment made "pursuant to legal process regular on its face, if such payment is made in accordance with this section and the regulations issued to carry out this section." In the present case, the court of appeals did not dispute that the garnishment writ was "regular on its face," but held that the writ was not "legal process" within the meaning of the garnishment statute. Section 662(e)(1) defines "legal process" to require issuance by a "court of competent jurisdiction," and the court of appeals held that a "court of competent jurisdiction" is one that has personal, as well as subject matter, jurisdiction. Accordingly, a garnishment writ issued by a court lacking personal jurisdiction is not "legal process." The court thus concluded that when the government honors such a writ despite notice of "a claim of substantial jurisdictional irregularity," the government is not protected from liability by Section 659(f).

As an initial matter, we are puzzled by the court of appeals' conclusion (Pet. App. 8a) that the term "court of competent jurisdiction"—whatever its meaning—refers to the court that issued the underlying judgment, rather than to the court that issued

phrase "legal obligation" would seemingly exclude judgments suffering any legal defect. And even if limited to judgments held to be void, this approach would be subject to all of the objections we have lodged to the court's holding concerning "legal process." See subpart A.2, *infra*.

³⁰ As pointed out in note 18, *supra*, the legislative history shows that the 1977 amendments were intended to clarify, not substantively to change, the prior Section 659.

the writ of garnishment.²¹ These need not be the same, and even if they happen to be the same, as in this case, the question of personal jurisdiction in the two actions is quite likely to be different.²² For example, if a divorce decree had been procured by Mrs. Morton in Virginia, prior to moving to Alabama, and respondent had subsequently defaulted on his sup-

²¹ The federal cases cited by the court of appeals in support of its view (Pet. App. 8a n.4) involved pre-judgment attachments where the plaintiffs sought to obtain quasi in rem jurisdiction on the basis of the attachment.

²² Garnishment actions are commenced under different forms of action in different states, but it is long established that, for jurisdictional purposes, a post-judgment garnishment action "is a new suit to which the creditor is plaintiff and the garnishee, the defendant." 2 R. Shinn, *Attachment and Garnishment* §§ 469, 470, at 836-838 (1896); see *United States ex rel. Ordmann v. Cummings*, 85 F.2d 273, 275 (D.C. Cir. 1936). Although the principal debtor (the defendant in the underlying proceeding) has the right to appear and defend as a party, the jurisdiction of the garnishment court does not depend upon personal jurisdiction over the principal debtor. *Shaffer v. Heitner*, 433 U.S. 186, 210-211 n.36 (1977). The general rule is that the plaintiff may bring the garnishment action anywhere that the principal debtor could have brought suit to collect his debt from the garnishee. *Orrox Corp. v. Orr*, 364 So.2d 1170, 1171 (Ala. 1978); *Dorr-Oliver, Inc. v. Willett Associates*, 153 Conn. 588, 219 A.2d 718 (1966). Of course, both under the traditional law of garnishment (see *Harris v. Balk*, 198 U.S. at 227) and under evolving principles of due process (see, e.g., *Community Thrift Club, Inc. v. Dearborn Acceptance Corp.*, 487 F. Supp. 877 (N.D. Ill. 1980)), the principal debtor must have notice of the garnishment action, at least where the underlying judgment was by default or confession, and in the absence of adequate alternative procedural safeguards. See *Betts v. Coltes*, 467 F. Supp. 541 (D. Hawaii 1979).

port obligations, Mrs. Morton could have filed a garnishment action against the Air Force in Alabama, identical in all material respects to the garnishment action here. In such a hypothetical, it would be clear that the term "legal process * * * issued by * * * a court of competent jurisdiction" would refer to the Alabama proceeding that resulted in issuance of the writ—not to the prior Virginia divorce proceeding. It would furthermore be clear that the "competence" of the Alabama court would not depend upon whether it correctly held that the hypothetical prior Virginia judgment was entitled to full faith and credit. Here, as in the hypothetical, there is no doubt concerning the jurisdiction—both personal and subject matter—of the Alabama court in the garnishment action brought by Mrs. Morton against the Air Force. The only question concerns the jurisdiction of the Alabama court in the underlying divorce action brought by Mrs. Morton against her husband. But that is a markedly different inquiry not relevant to the "competence" of the garnishment court to issue the writ.

Even overcoming this initial problem, and assuming arguendo that the invalidity of the underlying judgment somehow affects the competence of the garnishment court, the court of appeals' interpretation remains difficult to square with the statute. Section 659(f) provides that the government is immune from liability for honoring "legal process regular on its face." The term "legal process" is defined by statute (42 U.S.C. (Supp. V) 662(e)) to include "any writ, order, summons, or other similar process in the nature of garnishment, which * * * is issued by * * * a court of competent jurisdiction within any State, territory, or possession of the United

States." The terms "competence" or "competent jurisdiction" are not defined but, contrary to the court of appeals' apparent assumption, such terms are often used to refer to subject matter jurisdiction alone. See, e.g., *Pennoyer v. Neff*, 95 U.S. (5 Otto.) 714, 733 (1877) (emphasis added) ("To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance"); 1 Restatement (Second) of Judgments §§ 27, 28 (1982) ("The term 'subject matter jurisdiction' * * * is also sometimes referred to as 'competence' or 'competency.'"); Restatement (Second) of Conflict of Laws § 92 (1971); Restatement of Judgments § 7 (1942); 18 U.S.C. 2510(9) ("[j]udge of competent jurisdiction" means judge with authority to enter a certain type of order). In other contexts, the terms have been used to refer to personal as well as subject matter jurisdiction. See, e.g., *Arizona v. California*, No. 8, Orig. (Mar. 30, 1983), slip op. 13; *Ex parte Davis*, 66 Okla. Crim. 271, 285, 91 P.2d 799, 807 (1939).²³

²³ The court of appeals noted (Pet. App. 9a) that respondent relied for his interpretation of the term "court of competent jurisdiction" on *Robinson v. Attapulugus Clay Co.*, 55 Ga. App. 141, 189 S.E. 555 (1937), and *State v. Long*, 44 Del. 251, 59 A.2d 545 (Ct. Gen. Sess. 1948), rev'd on other grounds, 44 Del. 262, 65 A.2d 489 (Sup. Ct. 1949). The statements relied on in both decisions are dicta; *Robinson* did not involve interpretation of the term "competent jurisdiction," and in *Long* the controverted question was whether the court had jurisdiction over a *res*—not over the parties.

In this case, the context clearly indicates that "court of competent jurisdiction" cannot refer to an issue—such as personal jurisdiction—that is not determinable from the face of the writ. The statute expressly immunizes the government from liability for honoring "legal process regular on its face" (42 U.S.C. (Supp. V) 659(f)). The phrase must be interpreted as a whole. It does not embody two separate and independent concepts. Whether a writ is "legal process" must be determinable on the face of the writ; otherwise, the qualification "on its face" would be rendered meaningless. Interpreting the phrase "court of competent jurisdiction" to refer in this context only to subject matter jurisdiction harmonizes Section 659(f)'s reference to "legal process regular on its face" with Section 662(e)(1)'s definition of "legal process." Unlike the lack of personal jurisdiction, the absence of subject matter jurisdiction is almost always detectable from the face of the process.

The court of appeals' conclusion perfectly illustrates the interpretative problem created by viewing the two parts of the phrase in isolation. If the term "legal process" is understood to be limited to process issued by a court with personal, as well as subject matter, jurisdiction—a question not generally determinable on the face of the writ²⁴—the government is not immune from suit for complying with process that is "regular on its face," as the plain language of Section 659(f) provides. Instead, the government would be required to look beyond the facial validity of a garnishment writ and determine whether the

²⁴ This is especially true where the alleged jurisdictional defect is in the underlying proceeding rather than in the garnishment itself.

state court that issued the underlying judgment had personal jurisdiction over the defendant. The court of appeals' construction thus effectively nullifies the language "regular on its face" and renders Section 659(f) internally inconsistent. See *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975); *Chemehuevi Tribe of Indians v. FPC*, 420 U.S. 395, 403 (1975); *Clark v. Uebersee Finanz-Korporation, A.G.*, 332 U.S. 480, 488-489 (1947).²⁶

Apparently recognizing that its interpretation would deprive the government of its statutory protection for honoring writs that are regular on their face, the court of appeals declared (Pet. App. 17a (footnotes omitted)) that "the immunity provisions of the garnishment statute permit the Government, where the process document is regular on its face, to make payment without liability on a presumption that the underlying judgment is valid, but that such a presumption is rebuttable by a showing that the Government had notice of a substantial claim of jurisdictional irregularity." Whatever the merit of this rule—and we will show that it is unworkable

²⁶ Respondent defends the court of appeals' interpretation by suggesting that Congress "intended to insulate the government from suit when they honored a 'voidable' judgment as opposed to a 'void' judgment" (Br. in Opp. 12). This position, however, finds no support in the language or legislative history of the statute. We do not doubt that Congress could have drawn the line between "void" and "voidable" judgments; however, the line actually drawn is between legal process "regular" or irregular "on its face." And since this determination is one to be made by federal disbursing agents, who ordinarily lack either the information or the legal training that would be required to distinguish between void and voidable judgments, it is easy to understand why Congress decided as it did.

(see pages 40-42, *infra*)—it is clearly the court's own invention. The court did not purport to extract it from any provision of the federal garnishment statute, from the legislative history of the statute, or indeed from any other authority.

This interpretation cannot be reconciled either with the plain meaning of Section 659(f) or with the court of appeals' own reading of the term "legal process." Section 659(f) unambiguously shields the government from liability whenever it honors a state garnishment writ that is "regular on its face"; it carves out no exception for cases where the government has notice of potential challenges to the state court's personal jurisdiction. Notice of such potential challenges would be equally immaterial if the court of appeals' interpretation of the phrase "court of competent jurisdiction" were accepted. If a court without personal jurisdiction is not a "court of competent jurisdiction," as the decision below held (Pet. App. 8a-11a), then a garnishment writ issued by such a court would not be "legal process" within the meaning of the immunity provision and that provision could not apply. Thus, under either construction, whether the government had notice of the jurisdictional defect would not seem to matter.

The court of appeals' nonliteral interpretation of Section 659(f) is especially inappropriate to a statute waiving sovereign immunity. Such a waiver must be "unequivocally expressed" (*Lehman v. Nakshian*, 453 U.S. 156, 160 (1981); *United States v. King*, 395 U.S. 1, 4 (1969)); the "limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied" (*Lehman*, 453 U.S. at 161, quoting *Soriano v. United States*, 352 U.S. 270, 276

(1957)). The court's implication of a burden on the government to undertake legal investigation and litigation whenever the employee defendant gives notice of a latent jurisdictional defect in the proceedings underlying the garnishment writ vastly expands the liabilities and obligations of the government beyond anything that Congress expressly imposed or could reasonably have intended when it waived sovereign immunity.

It is essentially for these reasons that our interpretation of the phrase "legal process regular on its face" has been adopted by two courts of appeals (*Rush v. United States Agency for International Development*, 706 F.2d 1229 (D.C. Cir. 1983) (table), cert. denied, No. 83-382 (Jan. 9, 1984) (Pet. App. 104a-107a); *Jizmerjian v. Department of Air Force*, 457 F. Supp. 820 (D.S.C. 1978), aff'd, 607 F.2d 1001 (4th Cir. 1979), cert. denied, 444 U.S. 1082 (1980)) and the Comptroller General (*In re Technical Sergeant Harry E. Mathews, USAF*, File No. B-203668 (Comp. Gen. Feb. 2, 1982) (Pet. App. 109a-111a)). In *Rush*, a federal employee sued for recovery of garnished wages and injunctive relief, claiming among other things that the state court that ordered him to pay child support lacked personal jurisdiction. Noting that the government is immune from suit for payments made pursuant to a garnishment writ that is "regular on its face," the District of Columbia Circuit stated (Pet. App. 107a):

In the present case, *Rush* has not claimed that the garnishment order was facially invalid or that AID violated statutory requirements or applicable regulations. Thus, at least to the extent that *Rush* seeks reimbursement of funds previously garnished, he is barred by the stat-

ute from litigating those claims against AID or its administrator.

The court did not inquire whether the government had notice of any substantial jurisdictional irregularities, as the decision below would require. Accord, *Jizmerjian v. Department of Air Force*, *supra*.

In *Mathews*, the Comptroller General considered whether there is authority to reimburse an Air Force sergeant for pay garnished under a facially valid order, where the order had subsequently been set aside for want of personal jurisdiction (Pet. App. 110a). Relying on Section 659(f), the Comptroller General concluded that there is no authority for reimbursement under those circumstances. The opinion stated (Pet. App. 110a-111a):

The inquiry into whether an order is valid on its face is an examination of the procedural aspects of the legal process involved, not the substantive issues. Whether a process conforms or is regular "on its face" means just that. Facial validity of a writ need not be determined "upon the basis of scrutiny by a trained legal mind," nor is facial validity to be judged in light of facts outside the writ's provisions which the person executing the writ may know. *Aetna Insurance Co. v. Blumenthal*, 29 A.2d 751, 754 (Conn. 1943).

3. The court of appeals defended its interpretation of Section 659 by suggesting that a contrary holding would violate respondent's due process rights.²⁸ There

²⁸ The court stated (Pet. App. 17a): "To hold otherwise and to require (as would the dissent) Colonel Morton, a resident of Alaska, to proceed in the Alabama state court against Mrs. Morton would, in effect, render [42 U.S.C. 659] violative of constitutional due process."

is no basis for this suggestion. The personal jurisdiction requirement admittedly protects an individual liberty interest recognized by the Constitution, but it does not violate due process to require a civil defendant to take appropriate steps to invoke this protection (*Insurance Corp. of Ireland, Ltd. v. Compagnie Des Bauxites de Guinee*, 456 U.S. 694, 702-705 (1982)) or to permit third parties to act in reliance on a facially valid judgment until the defendant has done so.

Here, respondent was given actual notice of his wife's suit against him in Alabama (Pet. App. 89a) and also of the garnishment action against his employer, the Air Force (*id.* at 91a). He could have entered a limited appearance for the purpose of challenging the Alabama court's personal jurisdiction or, having risked a default judgment in the underlying litigation, could have challenged the judgment on jurisdictional grounds in the garnishment action or other collateral proceeding (*Insurance Corp. of Ireland*, 456 U.S. at 706). The very purpose of the notice requirement recognized in state law and by federal statute and regulation is to enable the employee debtor to take such steps as he deems appropriate to protect his interests. Having neglected to assert his rights, as he had the opportunity to do, respondent can hardly claim now that due process would be infringed if he were denied the opportunity to shift his losses to his employer.

Indeed, fundamental considerations of fairness largely cut the other way. To require the garnishee—a mere stakeholder—to shoulder the cost and burden of litigating the issue of personal jurisdiction, and to impose the penalty of double payment on the garnishee if a court subsequently holds the original

state court judgment void, is not self-evidently just. Nor does it seem entirely fair for the courts below to have adjudicated the rights of Mrs. Morton and the children without their participation in the litigation. The conflicting interests of creditor, debtor, and garnishee are indeed difficult to balance in multi-state situations such as this, but Congress's solution—to require the government, as garnishee, to give notice to the debtor but to comply with facially valid state court decrees until they are set aside—is a reasonable accommodation that does not offend “traditional notions of fair play and substantial justice.” *Insurance Corp. of Ireland*, 456 U.S. at 703, quoting *International Shoe Co. v. State of Washington*, 326 U.S. 310, 316 (1945), quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940).

B. The Court Of Appeals' Decision Disregards Regulations Authorized By Congress To Implement The Statute

Congress specifically authorized the issuance of regulations that would govern the scope of liability of the United States and its disbursing agents for payments pursuant to Section 659. 42 U.S.C. (Supp. V) 661. Section 659(f) provides that the regulations will have the following effect (emphasis added)):

Neither the United States, any disbursing officer, nor governmental entity shall be liable with respect to any payment made from moneys due or payable from the United States to any individual pursuant to legal process regular on its face, *if such payment is made in accordance with this section and the regulations issued to carry out this section.*

Under this “explicit delegation of substantive authority” (*Schweiker v. Gray Panthers*, 453 U.S. 34,

44 (1981)), the regulations issued by the Office of Personnel Management²⁷ implementing Section 659 (5 C.F.R. Pt. 581) are "‘entitled to more than mere deference or weight.’" They are "entitled to ‘legislative effect.’" 453 U.S. at 44 (quoting *Batterton v. Francis*, 432 U.S. 416, 425, 426 (1977)). The regulations set out in great detail the requirements and procedures for honoring writs of garnishment. If payments are made in accordance with the regulations, neither the government nor the disbursing officer may be held liable for reimbursement.

The regulations remove all discretion from disbursing officers to "refuse[] to honor the writs of garnishment," as the court of appeals would require (Pet. App. 19a n.14), except in certain circumstances enumerated in 5 C.F.R. 581.305(a). Moreover, the regulations make clear that the government will not—as the court of appeals would seemingly require—represent the interests of the employee defendant in the underlying proceeding. 5 C.F.R. 581.302(b) (2).

5 C.F.R. 581.301 provides that upon proper service of process, the employing agency shall "withhold payment of [garnishable sums] for the amount necessary to permit compliance with the legal process." 5 C.F.R. 581.302(a) requires, *inter alia*, that the government give the employee defendant written notice of service, including a copy of the legal process, as soon as possible, and not later than 15 days after service. 5 C.F.R. 581.302(b) authorizes the govern-

²⁷ The President delegated authority to issue regulations implementing Section 659 to the Office of Personnel Management. Exec. Order No. 12105, 43 Fed. Reg. 59465 (1978). Prior to issuance, the regulations were published for public notice and comment. See 44 Fed. Reg. 60301-60306 (1979); see also 48 Fed. Reg. 811-812 (1983).

ment to inform the employee that "the United States does not represent the interests of the obligor [i.e., employee] in the pending legal proceedings," that "the obligor may wish to consult legal counsel regarding defenses to the legal process," and that members of the uniformed services may wish to avail themselves of certain provisions of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. App. §§ 520, 521, and 523 (relating, *e.g.*, to stays of proceedings where military service affects their conduct). 5 C.F.R. 581.305(a) as amended by 48 Fed. Reg. 26280 (1983) explicitly states:

The governmental entity shall comply with legal process, except where the process cannot be complied with because:

(1) It does not, on its face, conform to the laws of the jurisdiction from which it was issued;

(2) The legal process would require the withholding of funds not deemed moneys due from, or payable by, the United States as remuneration for employment;

(3) The legal process is not brought to enforce legal obligation(s) for alimony and/or child support;

(4) It does not comply with the mandatory provisions of this part;

(5) An order of a court of competent jurisdiction enjoining or suspending the operation of the legal process has been served on the governmental entity; or

(6) Where notice is received that the obligor has appealed either the legal process or the underlying alimony and/or child support order, payment of moneys subject to the legal process shall be suspended until the governmental entity is ordered by a court, or other authority, to re-

sume payments. However, no suspension action shall be taken where the applicable law of the jurisdiction wherein the appeal is filed requires compliance with the legal process while an appeal is pending.

The regulations thus do not permit disbursing officers to refuse to honor a writ because of doubts about personal jurisdiction over the employee defendant in the underlying divorce proceeding. This has recently been made even more explicit. See 5 C.F.R. 581.305(a)(6)(f), as added by 48 Fed. Reg. 26280 (1983):

If a governmental entity receives legal process which, on its face, appears to conform to the laws of the jurisdiction from which it was issued, the entity shall not be required to ascertain whether the authority which issued the legal process had obtained personal jurisdiction over the obligor.

There can be no dispute that these regulations reflect a reasonable implementation of the statute. As regulations explicitly authorized by Congress, they are entitled to more than the usual deference accorded interpretations by the agency entrusted with implementation of a statute. Here, the court of appeals virtually ignored them.²⁸ The federal disbursing agents in this case complied fully with the regulations. They and the government are therefore immune from suit for reimbursement of the payments made to the Alabama court from respondent's salary.

²⁸ The court of appeals quoted the implementing regulations to establish that "legal process" must be issued by a "court of competent jurisdiction" (Pet. App. 7a, 9a; see also *id.* at 8a), but did not otherwise allude to them. Cf. *id.* at 43a-45a (Nies, J., dissenting).

C. The Court of Appeals' Decision Is Contrary To Congressional Intent

The court of appeals' interpretation of the garnishment statute will frustrate Congress's expressed intent. The garnishment statute, together with other related measures, was enacted "to assure an effective program of child support." S. Rep. 1356, 93d Cong., 2d Sess. 2 (1974). The Senate Report stated (*id.* at 42-43) that "[t]he problem of welfare in the United States is, to a considerable extent, a problem of the non-support of children by their absent parents * * *. The Committee believes that all children have the right to receive support from their fathers. * * * [E]nforcement of child support obligations is not an area of jurisprudence about which this country can be proud."

Before the federal garnishment statute was enacted, there were two chief ways to enforce a child support or alimony award against a federal employee or member of the armed services living in another state. First, the non-employee spouse could seek to enforce the award in the courts of the employee's state. This procedure was unsatisfactory for several reasons. It was costly for the spouse—who was often without means of support—to litigate in a distant state. The employee frequently had no assets to attach other than his federal salary, which could not be garnished. An employee delinquent on his support obligations, who might have moved in the first place to escape payment, could simply move again. And because states are constitutionally required to extend full faith and credit to support orders only if they are final under the law of the issuing state (*Sistare v. Sistare*, 218 U.S. 1 (1910)), it was often neces-

sary for the spouse to bring repeated enforcement actions as installments became due.²⁹

The second available procedure, under the Uniform Reciprocal Enforcement of Support Act (URESA) (9 U.L.A. 643 (1979)), was drafted in 1950 in order to solve these and other problems. URESA or compatible legislation has now been adopted by every state.³⁰ Under URESA, the dependent spouse and children may file a complaint in their state of residence (§§ 13, 14). If the court finds that the complaint "sets forth facts from which it may be determined that the employed spouse owes a duty of support," the court sends the complaint to the appropriate court in his state (§ 17), where the local prosecutor represents the dependent spouse and children (§ 18) and seeks the issuance of a support order (§ 23).

Despite hopes, this procedure also proved ineffective, as Congress has recognized. The Senate committee that recommended enactment of Section 659 observed (S. Rep. 1356, 93d Cong., 2d Sess. 43 (1974)): "Thousands of unserved child support warrants pile up in many jurisdictions and often traffic cases have a higher priority." The committee noted (*id.* at 43-44) that the former wives and children of many affluent or middle-class fathers were

²⁹ See Note, *Counterclaims and Defenses under the Uniform Reciprocal Enforcement of Support Act*, 15 Ga. L. Rev. 143, 144 (1980) (hereinafter cited as Note, *Counterclaims and Defenses*); Note, *Interstate Enforcement of Support Obligations Through Long Arm Statutes and URESA*, 18 J. Family Law 537 (1979-1980).

³⁰ See Note, *Counterclaims and Defenses*, *supra*, at 145 n.11 (collecting statutes). New York, which has not adopted URESA, has a similar, compatible law (N.Y. Dom. Rel. Law §§ 30-43 (McKinney 1977)).

forced to live on public assistance because of the lack of effective procedures for enforcing support awards, and the committee listed as among the principal flaws in procedures then available "the statutory barrier to collecting from military personnel and Federal employees, and the low priority given child support investigations by the understaffed district attorney's offices" (*id.* at 44; see also 120 Cong. Rec. 40323-40324 (1974)). During the House debates on the garnishment statute, Representative Ullman, the floor sponsor, made much the same point, stating (120 Cong. Rec. 41810 (1974)): "[O]ur biggest problem in this whole area is that prosecutors fail to prosecute [under URESA] because they have more important things to do. We just simply have not even gotten a start on prosecuting these cases."

Congress also recognized the special problems posed by delinquent husbands who are federal or military retirees. A House report on a predecessor garnishment bill noted (H.R. Rep. 481, 92d Cong., 1st Sess. 17 (1971)) that suits to enforce retirees' support obligations were "frequently thwarted by a retiree pulling up stakes in the state in which he is being sued and moving to another state where legal action must be commenced again." Recommending the waiver of sovereign immunity for certain garnishment writs, the committee stated (*id.* at 18):

We recognize this is a drastic departure from anything we have had in the past; but we believe it is wrong for the United States to protect retired and retainer pay while the military retiree can, for practical purposes, ignore court orders.

* * * * *

We recognize that the military retiree, because of the frequency of moves during the time spent

on active duty, may have less roots in a particular community than his civilian counterpart.

The federal garnishment statute was designed to remedy many of these problems. It permits the garnishment of federal pay to enforce alimony and child support obligations "in like manner and to the same extent as if the United States * * * were a private person" (42 U.S.C. (Supp. V) 659(a)). This enables a dependent spouse or child to attach an asset that cannot easily be concealed, and it prevents a federal employee or retiree from evading payment by changing his residence. The government is not drawn into marital disputes and is spared undue administrative expense, because it is immune from liability for honoring "legal process regular on its face, if such payment is made in accordance with [the garnishment statute] and the regulations issued to carry out [that statute]" (42 U.S.C. (Supp. V) 659(f)). At the same time, the rights of employees and retirees are protected because they are promptly notified when the writ is served (42 U.S.C. (Supp. V) 659(d)) and may then take whatever steps are available to any other similarly situated debtor under the laws of the issuing state. See 120 Cong. Rec. 41810 (1974) (remarks of Rep. Ullman).

The court of appeals' decision is in conflict with this scheme and frustrates Congress's clear intent concerning enforcement of the alimony and child support obligations of federal and military employees and retirees.³¹ It also creates an unmanageable bur-

³¹ The decision, if not reversed, might also jeopardize the enforceability of support orders now exempted from restrictions on garnishment under 15 U.S.C. 1673, which uses the term "issued by a court of competent jurisdiction" in much the same way as it is used in Section 659.

den for federal disbursing officers by forcing them to make complex legal determinations on limited information, with the risk of being penalized by double payment if they err. In many instances, it draws the federal government into litigation in a posture adverse to that of the dependent spouses and children whom Congress intended to assist.

The magnitude of the administrative burden—and potential liability—imposed by the court of appeals' construction of Section 659 is immense, in light of the large numbers of federal employees and retirees, especially military personnel.³² Under the court's interpretation of the statute, the government would be liable for reimbursement if it honored a facially valid garnishment writ after having received "notice of a substantial claim of jurisdictional irregularity" (Pet. App. 17a). Indeed, the court reserved decision on the question whether notice of a mere "non-frivolous claim" would not also suffice (*id.* at 17a n.12).

Under so loose a standard, a large number of the federal employees whose salaries are garnished can be predicted to attempt to avoid payment by asserting alleged jurisdictional defects. Especially in cases involving servicemen, who, as Congress recognized (H.R. Rep. 481, 92d Cong., 1st Sess. 18 (1971)), are frequently transferred, asserting a colorable claim of lack of personal jurisdiction would not be difficult. As Judge Nies noted in dissent (Pet. App. 42a-43a), "[t]he majority's test of 'notice of substantial irregularity' means no more, on the basis of the facts here, than that an employee must tell his

³² We have been informed that more than 14,000 garnishment writs are received each year with respect to military personnel alone.

pay officer or supervisor that he was not domiciled in the state asserting jurisdiction over him."

Determining whether such claims are "substantial" or "nonfrivolous" is a task beyond the capabilities of federal disbursing officers. In the first place, there is no satisfactory way for disbursing officers to ascertain the relevant facts. If they rely on employees' allegations, employees will have little trouble establishing "substantial" claims. On the other hand, disbursing officers have no readily apparent means of engaging in independent factfinding. That presumably is why Congress provided protection for compliance with legal process "regular on its face"; it is not practical to expect disbursing officers to uncover latent defects in court orders.

Even if the facts in a particular instance are known and undisputed, the disbursing officer would often face additional hurdles of legal interpretation. Evaluating jurisdictional claims would be extremely time-consuming and would require considerable legal skill. Questions of personal jurisdiction are often difficult, and cases involving military personnel are likely to explore the outer reaches of the states' power. Moreover, the court of appeals' decision holds the government to an extremely high standard. The government may not safely rely upon a state court's determination that personal jurisdiction was present. Instead, the government must decide whether the state court erred, or at least whether a substantial or nonfrivolous claim of error has been asserted—and is subject to liability if a federal court later holds the state court's jurisdictional ruling incorrect.

The court of appeals' opinion is vague on the appropriate course for the government to take in cases where the disbursing officer determines that the per-

sonal jurisdiction of the state court that rendered the underlying judgment is in doubt. In fact, each of the potential alternatives is either unacceptable or inconsistent with Congress's purposes in subjecting federal salaries to garnishment for alimony or child support.

The court of appeals suggested in a footnote (Pet. App. 19a n.14) that the government should simply "refuse[] to honor" the garnishment writ if its validity is in doubt. Such a course would, however, deprive the employee's spouse and children of any expeditious means for challenging the disbursing officer's (possibly erroneous) conclusion that the state court judgment may be void. The court of appeals sanguinely observed that the spouse's interests would still be "protected" because she could invoke the procedures of URESA (*ibid.*). But Congress enacted Section 659 precisely to cure the documented inadequacies of the URESA remedy (see pages 38-40 *supra*). To relegate dependent spouses and children to "protections" found inadequate by Congress, in all cases raising "substantial" claims of jurisdictional defects, cannot be deemed consistent with congressional intent. In addition, such a course—if it is available at all²²—would provoke needless friction between the federal government and state courts (see Pet. App. 25a, 47a-52a (Nies, J., dissenting)) and could lead to contempt citations against disbursing officers or default judgments against the United States. See, *e.g.*, Ala. Code § 6-6-457 (1977) ("Pro-

²² A state court order is, after all, binding legal process. Accordingly, Judge Nies may be correct (Pet. App. 25a) that "[t]he United States could no more 'refuse to honor' the writ summoning the Government to the Alabama court than it could 'refuse to honor' the summons by the Court of Claims."

ceedings on failure to appear and answer") (Pet. App. 59a).

The more likely alternative is for the government to take the steps set out by regulation for instances in which it cannot honor the writ. 5 C.F.R. 581.305(b). In such instances (listed at 5 C.F.R. 581.305(a)), the federal agency is instructed to "respond directly to the [state] court, or other authority, setting forth its objections to compliance with the legal process," and to "inform the garnishor, or the garnishor's representative, that the legal process will not be honored." 5 C.F.R. 581.305(b).³⁴ As contemplated by the regulation, the consequence of this procedure may well be litigation between the United States and the spouse and children. This would place the United States in the position of litigating an issue in which it has no direct interest, on behalf of an employee who failed to assert his own rights, against the intended beneficiaries of the garnishment statute, the needy spouse and children.³⁵ It is difficult to believe that Congress intended such a perverse result.

A final alternative that may be available is for the government to file an interpleader action in federal court under 28 U.S.C. 1335. See *Texaco, Inc. v. LeFevre*, 610 S.W.2d 173 (Tex. Civ. App. 1980). Such a course would, we believe, obviate the possibil-

³⁴ This procedure would appear to be the equivalent of an "answer" or "return" under state law, and would probably be treated as such.

³⁵ The other instances in which the government might be compelled to litigate are inevitable, in that they involve issues of relevance to the government in the garnishment proceeding itself. See 5 C.F.R. 581.305(a). Here, federal involvement in the litigation is far more troublesome, since the government would be forced to support one side in a domestic conflict where the issues are directly pertinent only to the parties involved.

ity of double liability on the government. Little else commends the procedure. The spouse and children would be compelled to undergo litigation in federal court, which they can ill afford, and would be required to await receipt of their support and alimony payments until after the court renders judgment. See 28 U.S.C. 1335 (the plaintiff in interpleader must "deposit [] such money or property * * * into the registry of the court, there to abide the judgment of the court"). The corresponding advantage of this procedure to the employee debtor is likewise slim, since he may be called upon to litigate in the spouse's state (see 28 U.S.C. 1397)—the very result he is (presumably) seeking to avoid. And the forum for resolution of the conflict would be shifted from the state to the federal courts, which are less appropriate tribunals for resolving matters of domestic relations. See *Sosna v. Iowa*, 419 U.S. 393, 404 (1975); *Barber v. Barber*, 62 U.S. (21 How.) 582, 584 (1859). It is surely inconsistent with principles of comity and federalism to multiply the instances in which the lower federal courts are charged with second-guessing the decisions of state courts on matters of the state courts' own jurisdiction, especially since the state courts themselves are adequate and available to provide a remedy.

None of these alternatives is consistent with the purpose of enacting Section 659, which was to create a prompt, straightforward, and inexpensive means for spouses and children to obtain enforcement of support obligations. Congress did not contemplate the additional hurdles erected by the court of appeals. As stated in a colloquy between Representatives Ullman and St. Germain during the floor debate on enactment of Section 659 (120 Cong. Rec. 41810 (1974)):

MR. ST GERMAIN: Essentially, the mother or the wife goes into the State court and gets a judgment, and then proceeds on the judgment, on the execution of same, and proceeds with the garnishment: is that not correct?

MR. ULLMAN: The gentleman is correct.

MR. ST GERMAIN: And there are no other conditions precedent?

MR. ULLMAN: The garnishment is on the basis of the court order or decision. * * *

Congress thus intended the federal government to proceed with garnishment "on the basis of the [state] court order or decision" alone—not to undertake factual investigation and legal analysis, not to refuse to honor a facially valid writ, not to litigate against the spouse and children in state court, and not to involve the spouse and children in interpleader actions in federal court while withholding payments.

In sum, considerations of statutory language, agency interpretation, fiscal prudence, administrative efficiency, and redress for the needy class of spouses and children of federal employees all point in the same direction. The court of appeals' interpretation of Section 659 should be rejected.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. 42 U.S.C. (Supp. V) 659 provides:

(a) United States and District of Columbia to be subject to legal process

Notwithstanding any other provision of law, effective January 1, 1975, moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States or the District of Columbia (including any agency, subdivision, or instrumentality thereof) to any individual, including members of the armed services, shall be subject, in like manner and to the same extent as if the United States or the District of Columbia were a private person, to legal process brought for the enforcement, against such individual of his legal obligations to provide child support or make alimony payments.

* * * * *

(d) Notice

Whenever any person, who is designated by law or regulation to accept service of process to which the United States is subject under this section, is effectively served with any such process or with interrogatories relating to an individual's child support or alimony payment obligations, such person shall respond thereto within thirty days (or within such longer period as may be prescribed by applicable State law) after the date effective service thereof is made, and shall, as soon as possible but not later than fifteen days after the date effective service is so made of any such process, send written notice that such process has been so served (together with a copy

thereof) to the individual whose moneys are affected thereby at his duty station or last-known home address.

* * * * *

(f) Non-liability of United States, disbursing officers, and governmental entities with respect to payments

Neither the United States, any disbursing officer, nor governmental entity shall be liable with respect to any payment made from moneys due or payable from the United States to any individual pursuant to legal process regular on its face, if such payment is made in accordance with this section and the regulations issued to carry out this section.

42 U.S.C. (Supp. V) 661(a) provides:

(a) Authority to promulgate

Authority to promulgate regulations for the implementation of the provisions of section 659 of this title shall, insofar as the provisions of such section are applicable to moneys due from (or payable by)—

(1) the executive branch of the Government (including in such branch, for the purposes of this subsection, the territories and possessions of the United States, the United States Postal Service, the Postal Rate Commission, any wholly owned Federal corporation created by an Act of Congress, and the government of the District of Columbia), be vested in the President (or his designee).

(2) the legislative branch of the Government, be vested jointly in the President pro

tempore of the Senate and the Speaker of the House of Representatives (or their designees), and

(3) the judicial branch of the Government, be vested in the Chief Justice of the United States (or his designee).

* * * * *

42 U.S.C. (Supp. V) 662(e) provides:

(e) The term "legal process" means any writ, order, summons, or other similar process in the nature of garnishment, which—

(1) is issued by (A) a court of competent jurisdiction within any State, territory, or possession of the United States (B) a court of competent jurisdiction in any foreign country with which the United States has entered into an agreement which requires the United States to honor such process, or (C) an authorized official pursuant to an order of such a court of competent jurisdiction or pursuant to State or local law, and

(2) is directed to, and the purpose of which is to compel, a governmental entity, which holds moneys which are otherwise payable to an individual, to make a payment from such moneys to another party in order to satisfy a legal obligation of such individual to provide child support or make alimony payments.

2. 5 C.F.R. 581.102(f) provides:

"Legal process" means any writ, order, summons, or other similar process in the nature of garnishment, which may include an attachment, writ of execution, or course ordered wage assignment, which—

(1) Is issued by:

(i) A court of competent jurisdiction, including Indian tribal courts, within any State, territory, or possession of the United States, or the District of Columbia;

(ii) A court of competent jurisdiction in any foreign country with which the United States has entered into an agreement which requires the United States to honor the process; or

(iii) An authorized official pursuant to an order of a court of competent jurisdiction or pursuant to State or local law, and

(2) Is directed to, and the purpose of which is to compel, a governmental entity, to make a payment from moneys otherwise payable to an individual, to another party to satisfy a legal obligation of the individual to provide child support and/or make alimony payments.

5 C.F.R. 581.102(g) provides:

(g) "Legal obligation" means an obligation to pay alimony and/or child support which is enforceable under appropriate State or local law.

5 C.F.R. 581.202(c) and (d) provides:

(c) Where it does not appear from the face of the process that it has been brought to enforce the legal obligation(s) defined in § 581.102(d) and/or (e), the process must be accompanied by a certified copy of the court order establishing such legal obligation(s).

(d) Where the State or local law provides for the issuance of legal process without a support order, such other documentation establishing that it was brought to enforce legal obligation(s) defined in § 581.102(d) and/or (e) must be submitted.

5 C.F.R. 581.301 provides:

Upon proper service of legal process, together with all supplementary documents and information as required by §§ 581.202 and 581.203, the head of the governmental entity, or his/her designee, shall identify the obligor to whom that governmental entity holds moneys due and payable as remuneration for employment and shall suspend, i.e., withhold payment of such moneys for the amount necessary to permit compliance with the legal process.

5 C.F.R. 581.302 provides in part:

(a) As soon as possible, but not later than fifteen (15) calendar days after the date of valid service of legal process, the agent designated to accept legal process shall send to the obligor, at his or her duty station or last known home address, written notice:

* * * * *

(b) The governmental entity may provide the obligor with the following additional information:

(1) Copies of any other documents submitted in support of the legal process;

(2) That the United States does not represent the interests of the obligor in the pending legal proceedings;

(3) That the obligor may wish to consult legal counsel regarding defenses to the legal process that he or she may wish to assert; and

(4) That obligors in the uniformed services may avail themselves of the protections provided in sections 520, 521, and 523 of the Soldiers' and

Sailors' Civil Relief Act of 1940 (50 U.S. Code App. 501 *et seq.*).

5 C.F.R. 581.305 provides in part:

(a) The governmental entity shall comply with legal process, except where the process cannot be complied with because:

(1) It does not, on its face, conform to the laws of the jurisdiction from which it was issued;

(2) The legal process would require the withholding of funds not deemed moneys due from, or payable by, the United States as remuneration for employment;

(3) The legal process is not brought to enforce legal obligation(s) for alimony and/or child support;

(4) It does not comply with the mandatory provisions of this part;

(5) An order of a court of competent jurisdiction enjoining or suspending the operation of the legal process has been served on the governmental entity; or

(6) Where notice is received that the obligor has appealed the underlying alimony and/or child support order, payment of moneys subject to the legal process shall be suspended until the government entity is ordered by a court, or other authority, to resume payments. However, no suspension action shall be taken where the applicable law of the jurisdiction wherein the appeal is filed requires compliance with the legal process while an appeal is pending.

(b) Under the circumstances set forth in § 581.305(a), or where the governmental entity is directed by the Justice Department not to com-

ply with the legal process, the entity shall respond directly to the court, or other authority, setting forth its objections to compliance with the legal process. In addition, the governmental entity shall inform the garnishor, or the garnishor's representative, that the legal process will not be honored. Thereafter, if litigation is initiated or threatened, the entity shall immediately refer the matter to the United States Attorney for the district from which the legal process issued. To ensure uniformity in the executive branch, governmental entities which have statutory authority to represent themselves in court shall coordinate their representation with the United States Attorney.

* * * * *

(d) Neither the United States, any disbursing officer, nor governmental entity shall be liable for any payment made from moneys due from, or payable by, the United States to any individual pursuant to legal process regular on its face, if such payment is made in accordance with this part. However, where a governmental entity negligently fails to comply with legal process, the United States shall be liable for the amount that the governmental entity would have paid, if the legal process had been properly honored.

3. 48 Fed. Reg. 26279-26294 (1983) amended the pertinent provisions of § 5 C.F.R. Pt. 581 (1983) as follows:

1. In § 581.102, paragraph (f)(1)(ii) is revised to read as follows:

§ 581.102 Definitions.

* * * * *

(f) * * *

(1) * * *

(ii) A court of competent jurisdiction in any foreign country with which the United States has entered into an agreement that requires the United States to honor such process; or

* * * * *

9. In § 581.305, paragraph (a) (6) is revised and paragraph (f) is added to read as follows:

§ 581.305 Honoring legal process.

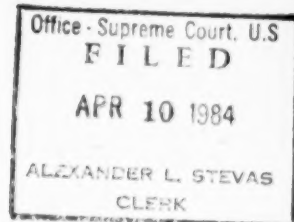
(a) * * *

(6) Where notice is received that the obligor has appealed either the legal process or the underlying alimony and/or child support order, payment of moneys subject to the legal process shall be suspended until the governmental entity is ordered by the court, or other authority, to resume payments. However, no suspension action shall be taken where the applicable law of the jurisdiction wherein the appeal is filed requires compliance with the legal process while an appeal is pending. Where the legal process has been issued by a court in the District of Columbia, a motion to quash shall be deemed equivalent to an appeal.

* * * * *

(f) If a governmental entity receives legal process which, on its face, appears to conform to the laws of the jurisdiction from which it was issued, the entity shall not be required to ascertain whether the authority which issued the legal process had obtained personal jurisdiction over the obligor.

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No. 83-916

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

ALLAN WAYNE MORTON

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF ON THE MERITS OF THE RESPONDENT
ALLAN WAYNE MORTON

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CORRECTION OF THE
QUESTION PRESENTED

Whether the United States Air Force may take the pay of one of its members and pay it over to such member's former wife on the basis of a void judgment of a state court, the judgment being void for lack of in personam jurisdiction over such member, when the Air Force knew the said state court's judgment was void before it first took such member's pay, and after taking such member's pay be immune from suit by the member against the Air Force for such member's military pay.

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SUMMARY OF ARGUMENT

This case is a claim brought against the United States (Air Force) to recover a military member's pay pursuant to 37 U.S.C. §204, et seq., and the Fifth Amendment to the Constitution of the United States. The defense of the Air Force is that 42 U.S.C. §659 authorizes it to take the military pay of one of its members on the basis of a void judgment even though the Air Force knew the judgment was void before it took the member's pay. Such a position would authorize the taking of property without due process of law and certainly was not the intent of Congress when it enacted 42 U.S.C. §659. The decisions of the Court of Claims (Claims Court) and of the United States Court of Appeals for the Federal Circuit, interpret 42 U.S.C. §659 so that it meets not only its obvious intent but also

avoids constitutional difficulties.

1. The lower courts properly applied the law to the facts in this case, consistent with the policy of the United States and the statute.

That the Alabama judgment for alimony and child support upon which the garnishment writ was issued is void for lack of in personam jurisdiction over Col. Morton is not contradicted by the Air Force. It could not do so under the facts in this case. Congress in the amendments to 42 U.S.C. 659 enacted in 1977, which were intended to clarify the statute, made it clear that the immunity granted the government under the statute was a limited one. The Air Force, however, has lifted out of context, one phrase of the statute, "regular on its face" and based its primary defense on those words. Although those words have a legal meaning established

long before the enactment of this statute, the Air Force has redefined them for its convenience to mean that its immunity is absolute. This is contra to the terms of the statute and the law of statutory construction. However, even under the Air Force's erroneous definition, the Alabama court's judgment and writ were not regular on their face.

2. The definitions of terms set forth in 42 U.S.C. 659, when applied to the facts of this case, make the Air Force's withholding of Col. Morton's pay arbitrary and illegal. The Alabama court was not "a court of competent jurisdiction" because of the lack of in personam jurisdiction over Col. Morton. Because the Alabama judgment for alimony and child support was not a "judgment issued in accordance with applicable state law by a court of competent jurisdiction" (which is the definition given

to alimony and child support by 42 U.S.C. 662 (b) and (c)]. The procedure in the Alabama court was not in accordance with Alabama law. Consequently, the pay that was withheld and paid to the Alabama court by the Air Force was not for alimony and child support. Additionally, the Court of Appeals said, these payments were not "legal obligations" under Section 659(a).

In view of the fact that the Air Force knew all these facts prior to taking his pay, its actions show a callous disregard for the rights of the service member. Nothing in this statute indicates other statutes and laws are to be ignored in order to achieve the purposes of this act. The Air Force's contention would bring about chaos in the law by giving legal effect to void judgments; it would deny constitutional rights by preventing service members from obtaining

a fair and effective hearing; it would overturn a long line of this court's cases; and it would encourage forum shopping for divorce courts.

The Air Force has failed to distinguish avoidable judgments from void judgments. Consequently, its conclusions are in error.

3. The Comptroller General's opinion cannot be cited as authority for reversal of a court's decision on the same subject. Neither can regulations promulgated after a court's decision be used as authority to overrule that decision. Neither can regulations expand or take away from the statutes' clear words.

4. The Court of Appeals' decision places most of the burden of investigation and documentation upon the member and upon the counsel for the garnishors. The burden on the government is far less than that placed on a private garnishee, the

government being immune from suit solely on the basis of 42 U.S.C. 659 et seq., as amended. Further, insistence upon the Soldiers' and Sailors' Civil Relief Act being honored by the state court will remove most if not all the burden.

"Administrative convenience" is not a shibboleth, the mere recitation of which dictates constitutionality." Frontiero v. Richardson 411 U.S.677 (1973).

5. Neither the federal courts, nor the government have been placed in the domestic relations business by the Court of Appeals' decision. Simply because 42 U.S.C. 659 et seq., as amended, requires the Air Force to make sure the state law is followed and the court entering the original judgment upon which the garnishment writ is issued had jurisdiction of the parties, does not place it in the domestic relations business.

This case involves only the legal relationship between Col. Morton and the United States Air Force. The Court of Claims has not required the government to intervene in the divorce case, nor to enjoin the suit, nor to modify that judgment in any way. The Court of Appeals' ruling has no effect whatsoever on the Alabama judgment. There is no other necessary party. Patricia Kay Morton could have been called by the Air Force as their witness, if in fact her testimony would have been any different from that of Col. Morton or his witnesses. The Air Force did not call her as a witness, neither in person, nor by deposition, nor by affidavit. Most of the evidence in the case was documentary, needing little evidence by way of testimony. The federal courts have ruled that they may not refuse to entertain suit simply because some facet of the suit involves intra family aspects. Cole v. Cole, 633 F.2d 1083, (4th Cir.1980).

6. The Air Forces contention that a judgment of a state court can be moved to any state and a garnishment writ brought on it is incorrect. Suit must be brought on a judgment when it is moved to another state and valid service of process made on the defendant in the state to which it is moved, thus bringing the judgment debtor before the court of the second state before a writ of garnishment can be brought in the second state.

The purpose of Congress in the enactment of 42 U.S.C. 659, et seq., as amended has been carried out by the Court of Appeals' ruling. It could not have been the intent of Congress to interpret a law so that it deprives a person of his constitutional rights.

7. The amicus has erred as to the facts of this case. Consequently, his arguments do not apply to this case. He has also cited cases that support Col. Morton's contentions.

ARGUMENT

The Court of Appeals' decision is consistent with the policy of the United States concerning the administration of military pay. The government's position supports the taking of military pay without due process of law. The military's Home of Record Statement does not refer to domicile; the Alabama judgment for alimony and child support is void. The Air Force's contention that the presumption of the proceedings being "regular on its face" is superior to actual knowledge is not valid.

1. This case was brought against the United States (Air Force) to recover a military member's pay pursuant to Title 37, Sec.204 et seq., United States Code and the Fifth Amendment to the Constitution of the United States. (Res.App.1a). (Pet.App. A-1a). It is well settled that the United States may not circumvent the unambiguous financial obligation which the law imposes on the United States to pay to a member of the Armed Services, his military pay, without valid, legal justification for doing so. Bell v. U.S., 366 U.S.393 (1961).

The strict rules regarding the sanctity of a military member's right to his military pay is a well settled principle of the law. Even in the extreme case of Otho Bell, who was a turn-coat prisoner-of-war during the hostilities in Korea in the 1950s, who showed utter disloyalty to his comrades and to his country, who consorted, fraternized, and cooperated with the enemy, sought favors for himself causing hardship to his fellow prisoners and who refused repatriation and went to Communist China after the hostilities ceased, the military service was required to pay him his military pay for the period he was a prisoner-of-war because he was not absent without leave or in any other status permitting involuntary withholding of pay. If the military services could withhold the pay of one of its members on any principle no matter how seemingly compelling, other than on a strict legal basis,

surely Otho Bell's case was one. It must be noted that the Congress in 1982 enacted legislation providing that the military may not even withhold a member's pay for a debt owed to the United States (for the most part over payments of allowances, claims for damage to household goods in shipment, etc.), unless it gives the member (a) 30 days written notice, (b) an opportunity to inspect the records of the alleged debt, (c) an opportunity to enter into a written agreement to establish a schedule for repayment and (d) an opportunity for a hearing before an impartial person (to include an Administrative Law Judge.)

Debt Collection Act of 1982, 5 U.S.C., 5514.

(Res.App.to Brief 1 a). The duty of any person administering the funds of another owes that other person the highest fidelity. The obligation of the military to its member concerning the military pay is even

greater because the exigencies of the military service may effectively prevent the member from monitoring such administration. Indeed, he shouldn't have to check.

The military service is liable for the arbitrary and capricious administration of a military member's pay. A claim for restoration of the pay that was due and unpaid to the military member results from such acts. Cherry v.U.S., 640 F.2d 1184 (1980); 697 F.2d 1043 (Fed.Circ.1983).

The Soldiers' and Sailors' Civil Relief Act, 50 U.S.C.A. §501 et seq., prevents any default judgment for the payment of money or property from being entered against a member of the Armed Services on active duty in the event any suit is allowed to go forward in such member's absence.

Added to all this, Congress enacted the Former Spouses Protection Act, 10 U.S.C. 1408, et seq., which became effective on

February 1, 1983, (Res.App.to Brief 2 a).

This Act provides that any court ordering payment of child support as defined in 42 U.S.C. 662 (b) and alimony as defined in 42 U.S.C. 662 (c), must be a court of competent jurisdiction; any judgment must be issued in accordance with the laws of the jurisdiction of that court; that the court order or other documents served with the court order, certify that the rights of the military member under the Soldier's and Sailor's Civil Relief Act of 1940 (50 U.S.C.A. §501 et seq.), were observed; that it must be issued by a court of competent jurisdiction; it must be legal in form and include nothing on its face that provides reasonable notice that it is issued without authority of law. The Act also stated that "a court may not treat the disposable retired or retainer pay of a member in the manner described unless the court has jurisdiction over the

member by reason of (a) his residence, other than because of military assignment, in the territorial jurisdiction of the court, (b) his domicile in the territorial jurisdiction of the court or (c) his consent to the jurisdiction of the court." Sec.1408C(4).

(Res.App.to Brief 2 a). Had Congress had this Morton case before it, it could not have spoken more clearly to the issue.

From all this, exclusive of the Act in question in this case, we find the legal principles and the policies of the United States are that the military services must exercise the highest degree of care and fidelity to the military member in administering his pay and allowances.

Regardless of these well settled legal principles and laws and the policy they show, the Air Force's contention is that 42 U.S.C. 659 et seq., as amended, authorizes it to take the military pay of

- one of its Air Force members on the basis of a void judgment, even though the Air Force knew the judgment was void before it took the member's pay.⁽¹⁾

(1) The Air Force received the first writ of garnishment with a copy of the judgment attached on 27 December, 1976. On 30 December, 1976, Col. Morton notified the Air Force Accounting and Finance Center that the judgment was not served nor was he notified and that he was not domiciled in nor a resident of Alabama. (Pet.App.39a, ¶6). On January 10, 1977, Col. Morton advised the Air Force that he had received service of process by mail. (Pet.App.38a, ¶5). Despite this, the Air Force confessed indebtedness on 11 January, 1977, and withheld his pay and paid it over to Alabama. (Pet.App.39a, ¶7).

By letter of 29 March, 1977, Col. Morton's present counsel forwarded to James R. Russell, Civilian Attorney-Advisor assigned to the Office of the Staff Judge Advocate, Air Force Accounting and Finance Center, Denver, Colorado 80279 (Pet.App.37a) a letter explaining why the Alabama judgment for alimony, custody and child support was void and enclosed a certified copy of the entire Alabama record which Mr. Russell in his affidavit refers to as documents, and which included the affidavit of non-residency of Col. Morton, executed by Patricia Kay Morton (Pet.App.39a, ¶18). Attached to the letter were copies of cancelled checks drawn by Col. Morton to Patricia K. Morton proving he had paid her voluntarily.

In other words the government's position is that 42 U.S.C.659 et seq., as amended, authorizes their taking of the pay and allowances of a military member without due process of law and in spite of the fact that the government is aware that the taking was without due process of law when the taking occurred.⁽²⁾

(2) On June 1, 1977, the said Attorney-Advisor for the Air Force wrote a letter to the U.S. Attorney in Birmingham, Alabama and the said Attorney-Advisor prepared an affidavit for this case in which he stated that the U.S. attorney advised that such service was sufficient pursuant to Rule 4:2, Alabama Rules of Civil Procedure. (Pet.App.40a). However, the said Air Force attorney, knowing the date of the certified mail he referred to in his affidavit was 1974 and not 1977, failed to point out this crucial fact to the U.S. Attorney. (See Res.App. to Brief 1a). Rule 4 of the Alabama Rules of Civil Procedure in effect in 1974, (Res.App.7a) when the suit was filed and substituted service was made, did not permit substituted service on a non-resident in a domestic case for any purpose except the termination of the marital status. This was changed in January 1977, by Rule 4:2 which requires, in order for Alabama to obtain in personam jurisdiction over the non-resident for purposes of alimony, child support and custody, that the parties had to have last lived together in Alabama and one spouse had to continue to live in Alabama or some wrong against the marriage had to have occurred in Alabama. (Res.App. to Brief 3a). The U.S. Attorney's reference to Rule 4:2 proved that he understood the time involved to be 1977 not 1974. (See Res.App. to Brief 5-7a). Cochran v. Cochran, 353 So.2d 805 (1978).

After the Air Force received the writ of garnishment in this case, Col. Morton put the Air Force on Notice that the Alabama proceedings were void. He did this before the Air Force withheld his pay. The Air Force withheld and paid his pay to Alabama in spite of his protestations and without investigation. After a letter from Col. Morton's counsel which enclosed the Alabama records, an Air Force Attorney-Advisor, whose duties are to review these garnishments, did decide to check into the matter by asking a U.S. Attorney in Alabama about it. However, he erroneously advised the U.S. Attorney that the Air Force records showed Col. Morton to be an Alabama domiciliary. This was the Air Force "Home of Record" document. Department of Defense regulations make it clear that the "Home of Record" document is used solely for the purpose of fixing travel and transportation allowances. (Pet.App.82a16(b)). It only refers to the place from which the

member entered the service and the Air Force cautions, in the "Home of Record" document, that it is not to be confused with "domicile" of the member. (Res.App. to Brief 7 a).

The Air Force does not argue in its Petition or Brief that the Alabama judgment for alimony and child support is not void. Indeed, such an argument would be difficult in the face of the facts in this case. Col. Morton was not personally served with process to bring him before the Alabama court (Pet. App.89(a)); he was not a domiciliary of Alabama when the suit was filed (Pet.App. 71a); he had no "minimum contacts" with Alabama when the suit was filed (Pet.App. 78a); there is no evidence Col.Morton committed any act against the marriage in Alabama (Pet.App.90a); and the Mortons last lived together in Virginia (Pet.App.85a); Alabama had no "long-arm" statute for

alimony and child support when the Alabama suit was filed (Pet.App.93a,94a), except of course the Uniform Reciprocal Enforcement of Support Act, and Col. Morton made no appearance of any kind in the Alabama divorce suit. (Pet.App.89a). To this must be added the facts that the Alabama suit was dismissed prior to judgment for lack of prosecution and the dismissal set aside without any Notice to Col.Morton, (Pet.App.89a), and that Col.Morton voluntarily paid alimony/child support payments to Patricia Kay Morton from the date of their separation until the garnishment of his pay began, (Pet.App.88a,89a). The initial garnishment was for \$4,100.00 which amount Col. Morton could not have owed, assuming the Alabama court had had jurisdiction over him by virtue of the fact he had been voluntarily paying Mrs.Morton. The Air Force also knew all of this prior to the taking of Col.Morton's pay. (Pet.App.66a).

There was no affidavit filed among the Alabama suit papers concerning Col. Morton's military status, and no guardian ad litem was appointed for him in accordance with The Soldiers' and Sailors' Civil Relief Act, 50 U.S.C.A. §520. (Pet.App.89a).

The Air Force contends, however, that its actual knowledge of the fact that the judgment upon which the garnishment writ was predicated was void, is of less import in legal effect in the administration of 42 U.S.C. 659 et seq., as amended, than the presumption that the garnishment and judgment was "regular on its face". This is an absurd contention.

Garnishment is an ancilliary or auxiliary proceeding, growing out of and dependent on another original or primary action or proceeding. Accordingly, where the principal action is void, the garnishment is also void. 38 C.J.S. Garnishment, §2(4); Wilkinson v. Cohen, 57 So.2d 108, (Ala.1951); Laborde v.

Ubarri, 214 U.S.173,174(1909). A valid judgment against a defendant in the original suit is a prerequisite of the validity of a judgment against a garnishee. Wilkinson v. Cohen, (supra). A judgment, writ, order, and the like, cannot be regular on its face if the underpinnings of that judgment, the proceedings that support it, are void no matter what the judgment itself declares itself to be. 46 Am.Jur.2d,Judgments,\$663; Armstrong v. Armstrong, 350 U.S.568 (1952); Vanderbilt v. Vanderbilt, 354 U.S.416 (1957). In Alabama, the state of the garnishment in the case at bar, the garnishee has a duty to see that there has been valid service of process upon the defendant in the original action (the divorce action in this case), and that a valid judgment has been entered. Southern Ry.Co. v. Ward, 26 So.234 (Ala.1898); Alabama G.S.R.Co.v.Chumley, 9 So.286 (1890); Louisville and N.R.Co.v. Nash,23 So.825 (1897). This same duty is written into the

Code of Federal Regulations implementing 42 U.S.C.659, et seq., as amended (5 C.F.R. \$581.102(f)). This is necessary to protect the serviceman who, because of the exigencies of the service, is not free to leave his military post to litigate a divorce case. Under the position espoused by the defendant if the member of the service didn't do just that, at the time the case was filed, his property would be taken without due process and contra to all the laws. The Air Force would have given it away no matter how void it knew the judgment to be. The statute 42 U.S.C.\$659, et seq., as amended, which is intended to cure one wrong, would be perpetrating another wrong, the more serious because it is a danger to the rights created in our Constitution. The government contends that Col.Morton must return to Alabama and litigate this matter. In addition to being an exceptional problem to the military member, this court

summarily rejected such an argument in Armstrong v. Armstrong, (supra). The military member, contra to the civilian, is not free to move about physically wherever and whenever he chooses.

The Court of Appeals did not feel the need to address the issue of whether the writ and judgment were "regular on their face" (708 F.2d 680). The only reference in this regard was made by the Court of Claims (Claims Court) in its Findings of Fact that the writ was on a "regular form" used in Alabama. (Pet.App.90a).

The term "regular on its face" or its opposite, "void on its face", is a legal term of art having a definite meaning in the law. The "face" of a judgment or writ is not, as the Air Force contends, the last document filed in a cause, it is the entire record of the case. (Groth v. Ness, 260 N.W. 700 (N.D.1935)). A judgment is "void on its face" when its invalidity appears upon

inspection of the judgment roll. Application of Behymer, 19 P.2d 829 (Calif.1933); Vaughn v. Vaughn, 100 So.2d 1 (Ala.1957).

The Air Force's use of the term indicates it is defining "regular on its face" to mean only the last document in the file. The definition supplied by the Air Force is not calculated to weed out any void judgments. Under the Air Force's definition of "regular on its face" it would have to be said that when the Congress felt the need to clarify this Act, 42 U.S.C. §659 et.seq., in 1977, it was indulging in useless direction and definitions and doing a useless act. Nowhere on a writ of garnishment alone can it be determined that it was issued pursuant to legal process by a court of competent jurisdiction, as required by 42 U.S.C. 662(e). (Pet.App.98a,99a).

It is necessary to look at the return of process in the original suit and

look at the state law to determine whether the process is legal and whether it comes from a court of competent jurisdiction. Nowhere on a garnishment writ alone can it be determined whether the decree, order or judgment was issued in accordance with applicable state laws by a court of competent jurisdiction so that it meets the definition of alimony and child support as is required by 42 U.S.C. 662 (b) & (c). (Res.App.3a-5a). Unless these definitions are met, the Air Force would be withholding the member's pay, and paying it over to the Alabama Court in this case, for something other than alimony and child support. Assuming, however, the Air Force's definition of "regular on its face" means only the writ received by them, in this case that writ showed the garnishment was not "regular". The writ served on the Air Force, included a copy of the divorce judgment which was attached, as it should

be. The divorce judgment, however, stated that the defendant had been "duly served" and failed to appear. (Pet.App.38a). Such language as "duly served" is ambiguous in an action for divorce because it fails to say duly served for what purpose. Divorce suits have been different in nature from other forms of action since 1942 when this Court decided the cases of Williams v. North Carolina I, 317 U.S. 287 (1942) and Williams v. North Carolina II, 325 U.S.226 (1945), in that they are divisible. That is, the court in a divorce suit may very well have jurisdiction to terminate the marital status if one party is domiciled in the state but have no jurisdiction whatsoever to award a money decree for alimony or child support. Therefore, even under the Air Force's definition of "regular on its face", the portion of the writ that was the judgment was ambiguous. This put the Air

Force on notice that a further check of the proceedings was necessary. In this case, however, the Air Force already knew the Alabama judgment was void.

The arbitrariness of the United States in the administration of Col. Morton's pay, is amply and repeatedly shown from the record.

2. Utilizing the definitions in 42 U.S.C. 659 et seq., as amended, requires the Court of Appeals' decision to be upheld; immunity of the government is not absolute; intent of Congress was to insulate the government only when an order was voidable, not when it is void; support obligations are not debts until created by a court of competent jurisdiction; situs of debt is with creditor. Notice is not synonymous with service of process.

(a) The clear language used in 42 U.S.C. 659, effective January 1, 1975, stated that the obligations that could

be honored by the United States had to be "...legal obligations to provide child support or make alimony payments." (Emphasis added). The statute was initially silent as to the immunity of the government for wrongful and illegal taking of the property of a military member or employee. (Res.App.2a).

In 1975, the Department of Defense Pay Manual Section 70710. Garnishment of Pay for Enforcement of Child Support and Alimony Obligations, (Res.App.3a), made it clear to all military personnel that garnishment of a member's pay had to be based on an order by a court of competent jurisdiction. The Air Force cannot claim ignorance of its own Regulations, Department of Defense Regulations being binding on the Air Force.

Between the time of the initial enactment of 42 U.S.C.659 in 1975 and the amendment of it in 1977 there had already been at least one suit against the United

States concerning this statute, Popple v. U.S. 416 F.Supp.1227 (1976) and at least two more cases filed and ready for decision, Overman v. U.S. 563 F.2d 1287 (8th Cir.1977) and Calhoun v. U.S. 557 F.2d 401 (4th Cir. 1977). Congress had the opportunity to completely exempt the government from any liability by merely saying any order received by the government for garnishment of a member's pay will be honored by the government and there shall be no liability on the part of the government for honoring any order for alimony and child support. Congress did not do that. It added subsection (f) (Pet.App.98a) which is very clear that the United States shall enjoy immunity with respect to these payments "...made from moneys due or payable from the United States to any individual pursuant to legal process regular on its face, if such payment is made in accordance

with this section and the regulations issued to carry out this section."

(Emphasis added). When Congress amended 42 U.S.C.659 in 1977, it also repeated and reiterated the phrase, "...legal obligations to provide child support or make alimony payments." (Emphasis added).(Pet.App.99a). It added Definitions in Section 662, (b) defining child support and (c) defining alimony. (Res.App.3a). The Congress again made it quite clear that the government may only honor "legal obligations", as a result of a "judgment issued in accordance with applicable State law by a court of competent jurisdiction." (Emphasis added). The Congress also defined "legal process" used in 42 U.S.C. 659 (a) in subsection (e) (Pet.App.98a-99a) as that process issuing from a court of competent jurisdiction.

The statute by its own terms defines what "alimony" and "child support" are, for

the purposes of this Act. No matter what other definitions there may be, in garnishment proceedings pursuant to this statute, we are limited to these definitions. Pursuant to 42 U.S.C.659 et seq., as amended, there is no "alimony" or "child support" unless it issues from a court of competent jurisdiction. The Act also requires that the alimony and child support be issued in accordance with applicable state law. 42 U.S.C. §662(e)(1). In order to insulate the government from liability, orders and decrees honored by the government must be from a court of competent jurisdiction and must be legal process regular on its face, issued from a court of competent jurisdiction and issued in accordance with applicable State law. The immunity of the United States for taking a member's pay is, therefore, by clear terms of the statute, a limited immunity. In stating very clearly in what situations the

United States could not be sued, Congress obviously rejected any contention that it could never be sued for its long established legal obligations to pay a service member his pay. The specific enumerations of exclusions from liability set forth in the statute indicate that no other immunity is granted. Ex Parte McCardle, 7 Wall. (74 U.S.) 509 (1869); Stephens v. Smith, 10 Wall. (77 U.S.) 321 (1870). The legislative history of the 1977 amendments to 42 U.S.C. 659 made it quite clear that the amendments were to clarify the act. Section 501 of Public Law 95-30 contained the amendments. Public Law 95-30 was the Tax Reduction and Simplification Act of 1977. As introduced, it contained no provisions concerning garnishment H.R. Rep. 3477 95th Cong. 1st Sess. 1977; S. Rep. 95-66 95th Cong. 1st Sess., 1977; 91 Stat. 126. Section 501 of the act was added to the amendments on the floor of the Senate

(125 Cong.Rec. 6722 April 29, 1977) by

Senator Nunn who said,

"The intent of these amendments that I am introducing today will be to clarify the garnishment provisions to provide for administrative improvements and to aid in the evaluation of the program."

A general explanation was included in the Congressional Record, Part A., "Clarification of Garnishment Provisions" stated the object of Section 501 (the amendments to 42 U.S.C. 659) was to clarify existing law. (125 Cong. Rec. 6722 (supra)). The question thus arises why Congress felt the need to clarify 42 U.S.C. 659 by these amendments if the government's position is correct; that is that even if the government knows the judgment of the State Court which issued the writ is void, the government owes no duty to its military member and is obligated to take his property and give it to the wife or former wife of such member upon receipt of

a copy of this void writ because it is on a "regular form" issued by the State Court. For such a position as that of the government, no interpretation or clarification by amendment of the statute to read that the government would not be liable when it honored a State Court Order if the writ was legal process regular on its face, issued by a court of competent jurisdiction pursuant to applicable State law. Those conditions set by Congress were intended to insulate the government from suit when it honored a "voidable" judgment as opposed to a "void" judgment, void because the Court issuing it had no jurisdiction over the defendant to enter such an order. The fact that the amendments to 42 U.S.C.659(f) fail to state that the government is totally, unequivocally and completely immune from liability for the taking of a military member's or its civilian employee's pay is not error or omission on

the part of Congress. The amendment was clearly an attempt to make the statute, 42 U.S.C. 659, constitutional in its application by assuring that the military member or its employee is afforded due process of law. To accept the government's position is to license the denial of due process of law by the United States. No such intent should or could be attributed to the Congress. The Illinois Supreme Court in Herb v. Pitcairn, (384 Ill.237, 51 N.E.2d 277, 280 (Ill.S.C.1943)) explains the distinction between "void" and "voidable" judgments as follows:

"It is the element of jurisdiction that differentiates a void from a voidable judgment; both the subject matter and the parties must be before the court, and jurisdiction of the one without the other will not suffice; the two must concur or the judgment will be void in any case in which the court assumes to act. Rabbitt v. Weber & Co., 297 Ill.491, 130 N.E.787. And we have further held that even a court of general jurisdiction has no power to do any act or render any judgment affecting persons or property, unless the particular act or judgment is

brought within its jurisdiction according to law. People ex rel. Brundage v. Righeimer, 298 Ill. 611, 132 N.E.229. These are general principles upon which substantially all courts are in agreement."

Although Alabama had long-armed statutes based on torts committed in Alabama and actions arising from doing business in Alabama, the Alabama Rules of Civil Procedure Rule 4, Process (C)(1)(B) (1973) (Res.App.5a), permitted substituted service of process (by mail) on a non-resident of Alabama for divorce only. When a statute says "divorce" and does not include the terms alimony and child support, process pursuant to such a statute is limited to termination of status and does not permit in personam judgments based on such process. May v. Anderson, 345 U.S. 528 (1953). As previously noted, divorce has long been severable from alimony, custody and child support. Alabama had no long-arm statute for alimony and child support in 1974. (Pet.App.93a-94a). The

Alabama judgment would not have been valid even under the long-arm statute that became effective in 1977. Alabama Rules of Civil Procedure, Rule 4.B(H) required that the parties have last lived in the marital relationship in Alabama and one party to have continued to live in Alabama in order for the court to exercise jurisdiction over a non-resident and Rule 4:B(I) required that a wrong had to be committed in Alabama against the marital relationship for the court to exercise such jurisdiction. These are not the facts in this instant case.

None of the requirements of 42 U.S.C. 659 et seq., as amended, so that the Air Force is insulated from liability, exist in this case. It is not immune from suit for military pay if only one of these requirements is missing, much less when all of them are missing.

The Air Force argues from both sides of the coin. It argues it is under

compulsion to withhold Col. Morton's pay and pay it into the Alabama Court or be subject to contempt proceedings and it would be subject to default judgments if it failed to honor a state court writ. On the other hand, the Air Force has argued since the inception of this suit that 42 U.S.C. 659 et seq., as amended, did not grant a cause of action against the government. Cunningham v. Department of the Navy, 455 F.Supp.1370 (D.C.Conn.1978); Popple v. U.S., 416 F.Supp. 1227 (D.C.N.Y.1976); Snapp v. U.S. Postal Service - Texarkana, 664 F.2d 1329 (4th Cir. 1982). Col. Morton has never denied that contention. Col. Morton's cause of action in this suit was not based on 42 U.S.C. 659, but was an action to recover his military pay pursuant to 37 U.S.C. 204, et seq.

It is the subject matter of the Petition, Complaint, Declaration, Motion for Judgment, or whatever it may be called

in the various courts that determines the jurisdiction of the court over the subject matter of the lawsuit and not the subject matter of the defense. Louisville & Nashville R.R. v. Mottley, 211 U.S. 149 (1908).

In any event, the Air Force is immune from contempt proceedings, default judgments and the like in state courts, except for negligence acts that may be brought under the Federal Tort Claims Act, 28 U.S.C. A. § 1346. To refuse to honor a writ of garnishment because the state court proceedings do not conform to the requirements of 42 U.S.C. 662 (e) (1), will not create legal difficulties for the Air Force.

The Air Force argues that where a defendant has been given notice by the garnishee this satisfies the due process requirement because such a defendant will have an opportunity to defend himself in

the attachment suit and cites Harris v. Balk, 198 U.S. 215 (1905). There is a distinction however, between the attachment of a debt that exists before the necessity of a court judgment to create it and alimony and child support obligations which do not exist until they are created by a court that has in personam jurisdiction over a defendant. Until a court of competent jurisdiction rules that a defendant is obligated to make alimony and child support payments, until such a court fixes the amount of such alimony and child support, and until such a defendant is in arrears in the orders of a court of competent jurisdiction, there is no debt to be condemned. The principle that the Air Force cites does not apply when there is no debt.

The other principle of Harris v. Balk, (supra) that the intangible debt may be attached in a state in which the creditor

has no minimum contacts has been overruled by this court in Shaffer v. Heitner, 433 U.S. 186 (1977). Under Alabama law, the situs of the debt has always followed the creditor, not the debtor. Louisville and Nashville Ry. Co. v. Nash, (supra). This court has also found the situs of the debt to be where the creditor is. Estin v. Estin, 334 U.S. 541 (1948). It is logical that the situs of a debt be with the creditor because the creditor owns the cause of action for the debt. The Air Force's argument that the Alabama court had both the subject matter and personal jurisdiction in the suit by Patricia Kay Morton against the United States is erroneous. The debt (subject matter) owed by the United States to Col. Morton was not located in Alabama. It was located where Col. Morton was, in Alaska.

The Air Force acknowledges that

state courts have held garnishees liable to reimbursement to the principal debtor where the underlying judgment was void and acknowledges Alabama is one of the those states. Louisville & Nashville R.R. Co. v. Nash, (supra). But, it argues that this is because the principal defendant had been given no actual notice of the underlying action. The Air Force's position is that "service of process" and "notice" are synonymous. This is erroneous. Knowledge of the pendency of a suit against a defendant does not give the court in which the suit is pending jurisdiction over the defendant. In the Alabama case of Partlow v. Partlow, 20 So. 2d 517 (Ala.

1945) the court said, "The mere fact that the defendant (non-resident) has actual knowledge or notice of the institution of the proceedings against him is not sufficient to give the court jurisdiction."

It is essential to the proper rendition of a judgment in personam that the Court have jurisdiction of the parties, even though such parties have knowledge as distinguished from notice, of the action, and, indeed, even though they are present at the trial. 46 Am. Jur. 2d Judgments, Sec. 25 p. 330. Minton v. First National Exchange Bank of Virginia, 145 S.E. 2d 139 (Va. 1935). National Metal Co. v. Greene Corsal Copper Co., 89 P.535, (1907). Strobe v. Strobe, 6 Idaho 67, 52 P.161 (1895); Lee v. Indep. School Dist., 149 Iowa 345, 128 N.W. 533 (1910); Beaufort County v. Mayo, 207 N.C. 211, 176 S.E. 753 (1934); Smith v. Smith, 159 Tenn. 36, 15 S.W. 2d 747; Greenwood v. Furr 251 S.W. 332 (Tex.1923).

"A personal judgment rendered without such jurisdiction is in violation of the due process clause of the United States

Constitution and is not merely voidable but is void." (Emphasis added). 46 Am. Jur. 2d Judgments § 25 (supra). The citations for this proposition are too numerous to quote but the case of Hess v. Pawloski, 274 U.S. 352, 71 L.Ed.1091(1927), 47 S.Ct. 632, accurately sets forth the law. Clearly knowledge is not a legal substitute for service of process and cannot give a Court in personam jurisdiction over a person. Estin v. Estin (supra); Kreiger v. Kreiger 334 U.S. 555 (1948); Armstrong v. Armstrong (supra); Vanderbilt v. Vanderbilt (supra). It is the lack of proper service of process that makes the judgment void.

Had there been legal service of process on Col. Morton in the divorce suit, it would have given the Alabama Court continuing jurisdiction over him to enforce the court's judgment by garnishment on the strength of mere notice to him prior to

the garnishment. Michigan Trust Co. v. Ferry, 228 U.S. 346 (1913); Sheffield v. Sheffield, 148 S.E. 2d 771 (S.C.Va.1966); Orrox Corp. v. Orr, 364 So. 2d 1170 (Ala. 1978). Garnishment being only ancilliary to the judgment, the jurisdiction continues.

(b) Many state court statutes are cited by the Air Force which provide generally the same as Alabama's, that "... the judgment condemning the debt, mohey or effects to the satisfaction of the plaintiff's demand is conclusive as between the garnishee and the defendant to the extent of such judgment, unless the defendant prosecutes to effect an appeal from such judgment." Alabama Code Sec. 6.6-461 (1977). This statute, and those like it are predicated upon the fact that the court issuing the original judgment had jurisdiction of the person and the subject matter. Otherwise, these statutes would

be authorizing the taking of property without due process of law. Jurisdiction is the threshold question of every cause of action and the court must have jurisdiction of both. "A judgment rendered without such jurisdiction is a violation of the due process clause of the United States Constitution and is not merely voidable but void." 46 Am. Jur 2d Judgments § 25 (supra). The courts are agreed that if the judgment in a garnishment proceeding is void because of lack of either subject matter jurisdiction or jurisdiction over the defendant, payment by a garnishee is no protection to him against a subsequent action by his creditors to recover the debt. 49 A.L.R. 1411 Annotation-Garnishment-Void-Protection, which cites Louisville & Nashville R.R. Co. v. Nash, (supra) and Southern Ry. Co. v. Ward, 26 So. 234 (Ala. 1898), 38 C.J.S. Garnishment, 293 (e). The Alabama Code § 6-6-461 and other

similar statutes apply to voidable judgments where the irregularity does not effect the jurisdiction of the court. They do not apply when the judgment is void. To interpret these statutes as applying when the original judgment is void for want of jurisdiction over the judgment debtor would indeed make these statutes constitutionally objectionable, particularly, as in this case, if the debt is contingent upon the judgment creating it. The Air Force errs in that it fails to distinguish between a voidable judgment which must be set aside before it is void and a void judgment which is ipso facto void and requires no action to set it aside. 46 Am. Jur. 2d, Judgments §49. Thus, an argument based on the need for relief from a void judgment is inappropriate. A voidable judgment is one in which the defect does not affect jurisdiction. A void judgment is one issued by a court without jurisdiction of subject matter or a party. Lacking

either, the court is not a court of competent jurisdiction. [The Air Forces' citation 1 New Restatement (Second) of Judgments § 16, Comment C 146 (1982) is irrelevant because it does not refer to judgments void ab initio but to reversed judgments, etc.]

In O'Toole v. Helio Products Inc., 149 N. E. 2d 795 (C.A.Ill.,1958) the court in holding that the garnishee has a duty to inquire into the validity of the judgment upon which the garnishment proceedings are based, also held the garnishee is not protected in making payments pursuant to the garnishment writ if the original judgment against the principal debtor is void for want of jurisdiction over the judgment debtors. The Air Force says this is the only case it has found to this effect. Col. Morton's counsel agrees. Cases of judgments that are void for lack of jurisdiction over

a party defendant are indeed rare. Since the enactment of 42 U.S.C. 659, there have been only a handful of cases even alleging such.

One of these cases alleging lack of jurisdiction in the original court was the case of Calhoun v. U.S. (supra). The Air Force states that Calhoun is in direct conflict with the case at bar. In addition to the distinction between that case and the instant one made by the Court of Appeals that Calhoun was decided prior to the clarifying amendments to 42 U. S. C. 659, Mr. Calhoun failed to give the Navy notice of any invalidity of the service of process on him prior to the time the Navy garnished his pay. Further, he never informed the District Court as to where he was in fact domiciled. California had a long-arm statute about which that Court of Appeals said the face of the judgment shows that ser-

vice of process was had in accordance with California Code of Civil Procedure, Sec. 415.40. The Fourth Circuit Court of Appeals looked into the matter of the original service of process. The cases of Cunningham v. Dept. of the Navy, 455 F. Supp. 1370, (Dist. Conn. 1978); Popple v. United States (supra); and Snapp v. U. S. Postal Service-Texarkana (supra), relied on by the Air Force for its position as to the effect of 42 U. S. C. 659 et. seq. as amended, were cases alleging a cause of action pursuant to the said statute. The statute did not create a cause of action. Overman v. U. S. (supra) was for an injunction alleging fraud in the procurement of the original judgment. In those cases the Court had jurisdiction of the parties and the subject matter in the underlying suit so that any defect in such a cause would make the judgment voidable, not void. In Jizmerjian v.

Dept. of the Air Force, 457 F. Supp. 820 (D.C. S. C. 1978) aff'd. 607 F. 2d 1001 (4th Cir. 1979), cert. den. 444 U. S. 1082, 1980), Mr. Jizmerjian accepted service of process in the Arizona court. In Rush v. U. S. Agency of Int. Dev. (706 F. 2d 1229 (D. C. Cir. 1983) (this court denied certiorari, No. 83-382, Jan 9, 1984) Mr. Rush actually brought the action himself in the state court. In each of these cases the parties were both before the court which issued the original judgment. Each had an opportunity to contest jurisdiction and he failed to do so. Therefore, the matter of jurisdiction became res judicata. Johnson v. Muelberger, 340 U. S. 581 (1951); Sherrer v. Sherrer, 334 U. S. 343 (1948) These cases are all distinguishable from the case at bar.

The litigation over this garnishment act has been exceedingly minimal. Such

cases will become even less as lawyers and judges become more familiar with what is required of them in order to comply with federal requirements.

The Air Forces' arguments that the garnishee under this act is a mere stakeholder under this act pales in view of the nearly seven years of litigation in this cause when all it had to do if it thought it was a mere stakeholder was to interplead the money. It knew better and it fully understands what must occur in order to make the government immune from liability.

This Act is a good one. The manner in which it is administered, however, must not be allowed to deprive anyone of their constitutional rights.

The Court of Appeals was correct in holding that a court should construe legislative enactments to avoid constitutional difficulty if possible. U. S. v. Clark, 454 U. S. 555 (1980); U. S. v. Harris, 347

U. S. 612, 618 (1954); Blasecki v. City of Durham, 456 F. 2d 87, cert.den.409 U. S. 912 (1972). Certainly, we do not wish to throw the baby out with the bath water, when all we need is to clean the tub.

3. The Comptroller General's opinion is not controlling; later enacted agency regulations cannot be relied upon to reverse a court decision; the court decision does not require payment to Col. Morton twice.

The government refers to a decision of the Comptroller General dated 2 February, 1982 (B-203668 - Matter of Technical Sergeant Harry E. Mathews, (U.S.A.F.). (Pet.App.F.)). The Comptroller General refused to allow Sergeant Mathews to be reimbursed the amounts that had been taken from his pay between the dates that an ex parte judgment had been rendered against him in Florida and the date that the Florida court ordered the garnishment set aside. The only basis for

disallowing his claim was that the documents received by the Air Force Finance Center were "regular on their face". At no place in the opinion does the Comptroller General, who although basically a financial administrative officer has certain "quasi-judicial" responsibilities when he rules on requests of doubtful expenditures presented to him by finance officers, mention the basic legal issues in these cases. That is, was the writ valid legal process from a court of competent jurisdiction? The Comptroller General, like the Air Force, merely looked at the garnishment order and seeing the word "court" pronounced it "valid on its face".

One court commented on the weight to be given to opinions of the Comptroller General in Alexander v. FERC 609 F. 2d 543, 546 U. S. Court of App. D. C. 1979.

"The court disagrees with the petitioner's assertion that it should give weight to opinions of the Comptroller General concerning interagency transfers. Questions on review concerning the authority of the F.E.R.C. are for the court to decide and this responsibility should not be abdicated to the Comptroller General."

The Comptroller General's decision, it is noted, was decided after the Court of Claims had decided this case, Morton v. U.S., decided December 14, 1981, (Pet.App.62a). The Comptroller General completely ignores the opinion of the Court of Claims where an ample discussion of court of competent jurisdiction appears. Administrative agencies, such as the General Accounting Office, are bound by decisions of the Court of Claims as well as all other Federal Courts. The legal conclusions of the Comptroller General are entitled to no weight in this case in

the face of a contra decision of the Court of Claims. The facts in Mathews, do serve to point out the difficulties of a military member who is not present to litigate.

After the initial decision was reached by the Court of Claims on December 14, 1981, later promulgated amendments in regulations cannot have any effect on the decision of the court. The Court of Claims' decision, although not final as to the amount of Col. Morton's pay to be paid to him, was final as to the question of the government's liability to him for the pay. Retroactive laws and regulations promulgated after a court decision is final would be legislative encroachment upon judicial powers. Since legislative enactments and regulations which would have the effect of rendering court judgments ineffective, cannot be applied retroactively because it would be direct legislative or executive reversal

of a court decision and such is per se objectionable. Sutherland Statutory Construction IV ed. C. Dallas Sands, Vol.2 (1972) 1983 pocket supplement, \$41.08.

It was obviously an attempt by the government to overturn the decision in this case when the government promulgated a new set of regulations which were published in the Federal Register, Vol.48, No.110, Tuesday, June 7, 1983. The said publication stated: "This revision expressly provides that agencies will not be required to ascertain whether the court or other authority which issued the garnishment order had obtained personal jurisdiction over the obligor prior to its issuance of the order." And, "Two Federal agencies submitted comments concerning the amendment to 5 CFR 581.305(f), which state that when a governmental entity receives legal process that appears to conform to the laws of the jurisdiction from which it was issued, the entity shall not

be required to ascertain whether the authority which issued legal process had obtained personal jurisdiction over the obligor. The amendment is consistent with the position that the government has taken in litigation concerning the issue."

Legislation may not be enacted by an administrative agency under the guise of its exercise of the power to make rules and regulations by issuing a rule or regulation which is inconsistent or out of harmony with or which alters, adds to, extends or enlarges, subverts, or impairs, limits or restricts the act being administered. 1 Am.Jur.2d Administrative Law, §132. The 1983 amendments to 5 C.F.R.581, promulgated after the Court of Claims' decision, attempts to insulate the government from all liability when such is in direct conflict with 42 U.S.C. 659 et seq., as amended. The statute is clear that unless the judgment for alimony

and child support is in conformity with the laws of the state which renders the judgment, it is not alimony and child support. In order to determine whether the judgment conforms to local state law, the government has to look into it, at least where it is put on notice of the defect. Otherwise, the government is paying out the pay of its employees for purposes other than child support and alimony. The government has attempted to expand the statute on its immunity and impair the right of the employee or member to his pay.

The Air Force contends it should not have to pay twice. It's not paying Col. Morton twice because it never paid Col. Morton the first time. There was no valid debt for alimony and child support due from him to Patricia Kay Morton and, therefore, the Air Force has not discharged an obligation of Col. Morton's which is what

occurred in The City of New Bedford, 20 Fed. 57 (1884). That case is distinguishable in that there was a pre-existing debt which was discharged by the garnishee. However, the legality of the proceedings could not withstand today's legal scrutiny.

The Air Force is required to make payment to a party legally due the money even if it has previously paid the money to someone else. Howell v. U.S. 195 F.Supp. 597 (1958). If the Air Force has been arbitrary and capricious in the administration of a military member's pay and pays it to the wrong party, it must pay the member his pay. Cherry v. U.S., (supra).

4. The Court of Appeals' decision does not impose on the government greater liability than that on a private garnishee; the exposure of the government is de minimis.

It is stated by the Air Force that the Court of Appeals' decision would impose on the government far greater liability and responsibility for legal investigation, analysis, and litigation than is borne by private garnishees. This is incorrect. The government, like any other Alabama garnishee, has a duty to assert all proper defenses of its creditor of which the defendant has knowledge. (6 Am.Jur.2d Attachment and Garnishment, Sec. 357 and Stewart v. Northern

Assurance Co., 32 S.E. 218 (W.Va. 1898).

The government had knowledge of the invalidity of the judgment in the case at bar. However, in order to afford the military member the same protection that a private garnishee affords its employer by asserting such defenses in the litigation, the Air Force is not required to do anything if it does not choose to do so. Because 42 U.S.C. 659 and its amendment created no cause of action against the government, it can merely refuse to honor any garnishment that does not conform to the terms of the statute and such will not subject it to liability. Consequently, the Court of Appeals' decision imposes much less liability and litigation on the government than a private garnishee.

Under the Court of Appeals' ruling the government would not be challenging a state court's order. The Court of Appeals'

ruling has absolutely no effect on the state court's order. It doesn't change it in any way. It merely says to the plaintiff in the state courts "seek your collection procedures in another manner where the service member will have an opportunity to be heard and challenge the court order", if there is a substantial claim of a jurisdictional defect. It does not require the government to intervene in the underlying litigation. Indeed, the government does not know of such litigation until the underlying action is concluded. The government is not required to take sides in the underlying litigation as the Air Force alleges. It should not take sides at any time. The Court of Appeals' decision only requires that the government uphold the federal law and administer the pay of a military member in accordance with that law. The Court of Appeals' decision actually relieved the

government of much of the burden that a private garnishee encounters when the original judgment on which the garnishment is based is void. The Court of Appeals' decision places the burden on the military member to notify the government of the lack of jurisdiction of the state court before the government pays over the member's pay. It puts the burden on the plaintiff's lawyers in the state court to follow the law.⁽³⁾

The government is in a far superior position under the Court of Appeals' decision than is a private garnishee in that the government is blessed, or cursed as the case may be, with in excess of 67,500 attorneys in its employ. See Hearings on Equal Access to Justice Act, H.R.Rep.96-1005, Part I, at page 8 on 28 U.S.C. §2412.

(3) Had the Alabama lawyer followed the mandates of the Soldiers' and Sailors' Civil Relief Act and a guardian ad litem had been appointed for Col.Morton, the great probability is that this case would not have been necessary.

Those include those Air Force Judge Advocates, like the one at Elmendorf Air Force Base, Alaska, who advised Col. Morton, through the Air Force's legal assistance program, that the Alabama Court's decision was void for lack of personal jurisdiction over Col. Morton (Res.App.to Brief 10 a). The Air Force Accounting and Finance Center in Denver, has an entire staff of attorneys, one being the attorney-advisor who stated that his principal duty was to review the legality of state garnishments served on the Air Force. The question arises as to why those attorneys are needed if the Air Force owed no duty to its member and was only a stakeholder? Any clerk could routinely confess judgment to a state court. The Air Force knew it had legal responsibilities in administering this act in spite of the fact that such is denied.

In order to fully comply with the

Court of Appeals' decision, all that is needed after the Air Force has been notified of the jurisdictional defect, is for the Air Force to require the garnishor's attorney to submit two additional authenticated sheets of paper, one showing the return of the process and two, a copy of the state law concerning process. The military can require its members to set forth their domicile on the finance records and put the burden on the member to keep it correct. The government can require its member or employee to submit evidence of the member's contention. If these facts are not conclusive, it can interplead the funds. It certainly can demand that the mandates of the Soldiers' and Sailors' Civil Relief Act (supra) be followed. This will eliminate most problems.

Almost all the states have now enacted a form of long-armed statute for alimony,

custody and child support based on the last place the parties had their marital abode as husband and wife. This information is known to the military or can be documented by the member. Such evidence is usually in the Air Force files. Determining these minimum contacts presents much less of a problem to the government than to a private employer.

In any event, the government no longer has a choice in cases of a retired member or member on retainer pay. It is now mandatory that the Air Force, pursuant to said 10 U.S.C.1408, Former Spouses Protection Act, determine all the facts that 42 U.S.C.659, et seq., as amended, requires. That is, it must determine whether the court was a court of competent jurisdiction; whether the final decree of divorce was issued in accordance with the laws of the jurisdiction of that court and whether the order and other documents served with the court order

certify that the rights of the member under the Soldiers' and Sailors' Civil Relief Act (supra) were observed. It is additionally required to determine, among other things, whether the court has jurisdiction over the member by reason of his residence, other than because of military assignment in all cases brought pursuant to 10 U.S.C.1408. The machinery required to make those determinations can certainly make the determinations required by the Court of Appeals' decision. This is particularly true when the percentage of ex-parte orders, not based on a separation and property settlement agreement, is minute. As a result of what was referred to in hearings before the enactment of this statute as a drastic departure from anything that existed in the past, one only has to look at the very small number of cases that have arisen concerning the garnishment of federal pay

as compared to the 13,000 garnishments the Air Force maintains exist for servicemen alone. (Pet.App.19).

5. The Court of Appeals' decision does not place the government nor the federal courts in the domestic relations business. Congress put the federal government in the garnishment business.

The Air Force says that the Court of Appeals' decision places the Federal Courts in the business of domestic relations. The Congress of the United States enacted this legislation and it put the federal government in the business of garnishing pay for alimony and child support out of which arises this military pay claim. Congress was indeed cognizant of such claims and that is one of the reasons for the amendment of 42 U.S.C. 659. The federal courts are not called upon to award divorces, make alimony, custody and child support rulings nor to modify a

state court's ruling on these matters. The validity of a garnishment is an issue that arises from the domestic case, it is not a domestic case itself. The federal courts have been called upon since very early on, to make decisions of what is alimony and what is not alimony in bankruptcy proceedings, even when the term alimony is used in the state court judgment, order, or decree.

Wetmore v. Markoe, 196 U.S. 68 (1904); In re Knuppenburg, et al, 422 F. Supp. 274

(Mich 1976); In re Albin 591 F. 2d 94

and, indeed, to determine the validity of marriages, Norris v. Norris, 324 F.2d 826, (9th Circ.1963). Such determination under a federal statute does not put the federal courts in the business of domestic relations. The federal courts are as adept at determining these questions as the state courts. The federal courts are also hearing cases arising from parental kidnapping and

child concealment between spouses and former spouses. Kajtazi v. Kajtazi, 488 F.Supp. 15 (E.D.N.Y.1978); Accord v. Parsons, 551 F. Supp. 115 (W.D.Val982); Bennett v. Bennett, 682 F.2d 1039 (D.C.Cir.1982); Lloyd v. Loeffler, 539 F.Supp.998 (D.C.Wisc.1982); Wasserman v. Wasserman, 671 F.2d 832 (4th Cir.1982); cert den. 103 S.ct. 372 (1983). These federal courts did not consider themselves in the domestic relations business. In Wasserman the court restated the wording in Cole v. Cole, 633 F.2d 1083 (4th Cir.1980), and said at page 834 of 671 F.2d:

"A district court may not simply avoid all diversity cases having intra family aspects. Rather it must consider the exact nature of the rights asserted or the breaks alleged... So long as diversity jurisdiction endures, federal courts cannot shirk the inconvenience of sometimes trading in wares from the foul rag-and-bone shop of the heart."

The Court of Appeals here looked at the nature of the right asserted, the claim for

military pay. The fact that it arose from a garnishment based on a claim for alimony and child support does not make it a domestic relations case nor put the court in the domestic relations business.

6. Domestication of a foreign decree requires in personam jurisdiction over a defendant; the purposes of 42 U.S.C.659 are supported by the Court of Appeals' decision and in accord with congressional intent.

The Air Force further contends that if Patricia K. Morton had obtained her divorce in Virginia, she could have filed a garnishment action on it in Alabama and then the term "Legal process *** issued by *** a court of competent jurisdiction" would refer to the Alabama proceedings not to the prior Virginia proceedings. The Air Force is operating under a false concept as to how these procedures work. One cannot

bring a garnishment proceeding in a state different from the state where the judgment upon which the garnishment is based was granted, without first domesticating the judgment. It is true all states must give full faith and credit to a valid judgment of a sister state but the procedure for doing that requires that a new law suit be filed for such purpose in the state where the judgment is going to be domesticated. In personam service of process in such new law suit must be made on the defendant in the new cause to domesticate the foreign decree. 47 Am.Jur.2d, Judgments, §930.

This being the case, the defendant, when legally served in the domestication suit, can raise jurisdictional questions concerning the original judgment as well as claim other defenses in the forum which is foreign to the state of the judgment. Thus, any jurisdictional problem that there may be

in the original judgment becomes res judicata, if not raised in the latter proceedings. Sherrer v. Sherrer, (supra). The underpinnings of a garnishment from a state, other than that from which the original judgment was entered, also must be from a court of competent jurisdiction.

Contrary to the Air Force's argument that the majority's opinion destroys the intended purposes of 42 U.S.C. 659 et seq., the majority decision applies the statute so that it is not constitutionally suspect by an interpretation that condones the taking of property without due process of law. Such an application is in accord with the intent of the 1977 amendment to the statute.

7. Amicus has misunderstood the facts of this case; URESA is a good law capable of producing excellent results and at the same time treating both parties fairly.

The amicus has misunderstood the facts in this case. First, he cites Associated Oil Co. v. Mullin, 294 P.421 (1930) for the proposition that neither the parties nor their privies, not strangers, can attack a judgment of a domestic court of record on jurisdictional grounds unless the want of jurisdiction appears on the face of the record. He concludes that the appropriateness of this suit is questionable. He is apparently unaware that the purported service in the Morton suit shows that Col. Morton was a non-resident of Alabama. Alabama having no long-arm statute for alimony and child support claims at that time, the jurisdictional defect appears on the record. Interestingly enough, the

California Court in using the term "court of record" lends corroboration to Col. Morton's position that "court of competent jurisdiction" means jurisdiction of the parties as well as the subject matter because if Congress had meant "court of record", that court which has subject matter jurisdiction, it would have said so.

Second, although the Air Force concedes the Alabama judgment was void for alimony and child support, the amicus differs and argues that after the date of the service of process on September 17, 1974, it doesn't matter what Col. Morton did. The amicus was unaware that Col. Morton had the intent to be domiciled in Alaska in May of 1974 and he was in Alaska in May of 1974 and had contracted to buy a home there.

Third, he argues that Col. Morton told the Air Force he was an Alabamian so he could avoid the expense in moving his wife

and children to Alabama. Col.Morton never told the Air Force he was an Alabamian. (Pet.App.27 a). Col. Morton was not obligated to move Patricia Kay Morton anywhere. Col. Morton merely permitted her to use his moving benefit. They were still married. Patricia Kay Morton unilaterally left Col. Morton in Virginia in the marital home where he remained for nearly nine months. She refused to accompany him to Alaska. (Pet.App. 11 a). Col.Morton didn't "ship" Patricia Kay Morton anywhere.

Fourth, and most grievous, is the amicus' statement that "...Col.Morton did not simply comply with one of those civilities of a divorce too often observed in the breach, visitation." The minor Morton child was living with Col. Morton in Alaska. (See Res.App.to Brief 9 a). Apparently the amicus also does not think children go to the visiting parent's home instead of

visiting parent going to the child's home. Such assumption as the amicus made is erroneous.

Fifth, Col. Morton never anticipated that his wife or the state of Alabama would support his children. Col. Morton voluntarily provided support for his children in an amount that had been agreed upon by the Mortons. Col. Morton provided support when he had no legal obligation to do so.

Sixth, there is no evidence that Col. Morton's conduct forced Patricia Kay Morton to leave Col. Morton. She didn't wish to live with him in Alaska. (Pet.App. 11 a). Too, the doors of the Virginia court were open to her for almost nine months after she left Col. Morton prior to his leaving. See Section 20-79 of 1950 Code of Virginia, as amended. (Res.App. 10 a). She chose not to use them.

Seventh, the amicus' position that a

fair forum is based on the economic circumstances of the parties has no application to the fact in this case. If Patricia Kay Morton had no funds, it seems absurd to say she would have moved to Alabama and only begun proceedings a year later when she could have gone into the Virginia Courts for immediate funds in either a pendente lite hearing in a divorce suit or a suit for separate maintenance.

Eighth, the amicus' statement that Col. Morton couldn't have voluntarily paid Patricia Kay Morton because the garnishment is based on an order for that amount, is tantamount to saying a man can't be charged with a crime because he is innocent. The fact is, Col. Morton voluntarily paid Mrs. Morton. (Pet.App.21 a).

Ninth, the amicus states Col. Morton had defenses that could control the Alabama litigation. Why should Col. Morton do that

when the Air Force Judge Advocate advised him that the Alabama court had no authority to enter an in personam judgment against him? Too, a military man can only fly space available if he is free to leave his duties. At the time he was acting Commander at Elmendorf Air Base, Alaska, (Res.App. to Brief 10 a) which is the Air Base between the continental United States and Russia.

Tenth, Patricia Kay Morton did not have to file in Alaska to litigate her right to alimony and child support. She can do that through URESA (supra). URESA is a very effective law. The amicus is obviously biased and in favor of a system that permits unilateral deduction of pay of a serviceman without benefit of a hearing as opposed to one that would permit both parties to be heard. Such a position also may result in double payments to a spouse. URESA and 42 U.S.C. 659 et seq., as amended can

exist side by side. Garnishment is fine when the member has been afforded a hearing but URESA should be used when the member has not been given a hearing. The machinery is present in both statutes to provide excellent satisfaction in reaching the object for which they were enacted. However, neither law can eliminate the human factor in the administration of the law.

Eleventh, the Amicus laments that Patricia Kay Morton must support herself and two minor children on \$500 a month. The amicus is assuming facts not in evidence because he doesn't know how much Patricia Kay Morton earns. If we are going to assume facts not in evidence, let us assume for the purpose of argument alone, that Patricia Kay Morton left Col. Morton in Virginia in order to go live with her high school sweetheart who is also in the military; that the eldest child married before he was

18 and the minor child was living with Col. Morton in Alaska and that she didn't marry her childhood sweetheart until the Air Force stopped sending Col. Morton's money to Alabama, although the Air Force continues to withhold his pay, even after both court decisions, which withholdings are now in excess of \$31,000.00. The foregoing statements are not all in the record, just as the amicus' are not in the record. (The portion of the claim of Col. Morton finding how much is owed to him in back-pay is not final in this cause.) Would the amicus in assuming the hypothetical posed take the same position he has under his assumed facts? The hypothetical is used merely to point out that not all women are good and being taken advantage of and not all men are bad and take advantage. The law must never operate on that assumption. Neither should court

briefs be written on assumptions. We do not have to assume, however, that the Alabama court, in an ex-parte proceeding in which there was no defense to voice an objection to whatever amount the Alabama court decided was appropriate, awarded Patricia Kay Morton \$500.00 per month as alimony and partial child support. What the other part of child support is, counsel cannot possibly speculate. Certainly no defendant would know what to comply with in such an order. Its definition does not appear in the record. Mrs. Morton has been paid three times for the same thing, once when the case was settled in Loudoun County, Virginia, once when Col. Morton voluntarily paid her and once when the Air Force took his pay and gave it to her.

Twelfth, the amicus fails to understand the divisible nature of the proceeding to terminate the marital status and the

proceedings for alimony and child support when he argues the theory of estoppel.

Thirteenth, the amicus also suggests that Col. Morton did not submit himself to the jurisdiction of the Alabama Court because he says the Air Force would have ordered Col. Morton to pay more money to Patricia Kay Morton or he would be discharged from the service. He says Col. Morton has avoided a claim of non-support and prevented an investigation by the Air Force in this manner. The amicus has his facts all wrong again. The Air Force has no authority to set alimony and child support nor order any member to pay any of his debts. In citing Air Force Regulation 35-18, paragraphs 3 and 5 (b), the amicus neglects to mention the paragraph that explains the limitations on the authority of the Air Force and which merely defines policy. The relevant portions of Air Force Regu-

lation 35-18 A.(1) states as follows:

"1. Air Force Policy. The Air Force expects its members to pay their debts on time. Within the limits of available resources, the Air Force provides financial management information, opportunities for education and personal counseling designed to enhance management of personal finances, and takes administrative or disciplinary action in cases of continued financial irresponsibility. Such action is taken to improve discipline and maintain the standards of conduct expected of Air Force personnel, but cannot be used to enforce private civil obligations." (Emphasis added).

"2. Indebtedness.

a) Air Force Enforcement of Private Obligations. The Air Force does not arbitrate disputed debts, admit or deny whether or not the complaints are valid, or confirm the liability of its members.

Under no circumstances does the Air Force communicate to complainants, whether any action has been taken against members as a result of complaints. Except for debts owed to the Federal Government, including its instrumentalities (for example, nonappropriated fund activities), the Air Force is not authorized to require a member to pay a private debt or to use any part of his or her earnings to pay the debt, even though the indebtedness may have been reduced to judgment by a civil court. The enforcement of private obligations of Air Force members is a matter for civil authorities." (Emphasis added).

The amicus has totally misunderstood Orrox v. Orr (Lillian M.) 364 So.2d 1170 (1978). Mr. Orr was personally before the Alabama court in the divorce proceeding. Orr v. Orr, (Lillian M. v. William Herbert), Ala.App.351 So.2d 904 (1977); 351 So.2d 906 (S.C.Ala 1977); 440 U.S. 268 (1979). The Alabama Court had continuing jurisdiction over Mr. Orr.

Amicus cites Rock Island Line v. Sturm, (174 U.S.710 (1899) for the proposition that debts belong to the creditors to whom they are payable. That is correct. Col. Morton is the creditor. In stating that a judgment creditor has a right of action against any debtor of the judgment debtor in any forum the judgment debtor could himself have brought suit, has been over-ruled. This is the concept of Harris v. Balk, (supra) that Shaffer v. Heitner, (supra), over-ruled. Further, Patricia Kay

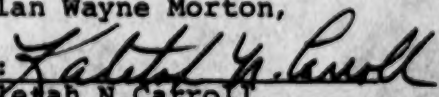
Morton was not a judgment creditor, the judgment being void.

The amicus states that when an obligor moves, under URESA, the obligee is deprived of support. This is not correct. The move of the obligor merely deprives the obligee of the right to have the obligor cited for contempt of court where the obligor resided when the order was entered. However, that order will support a garnishment writ, the obligor having been before the court when the order was entered.

CONCLUSION


The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,
Allan Wayne Morton,

By: 
Kathleen N. Carroll,
his counsel
4015 Chain Bridge Road
P.O. Box 434
Fairfax, Virginia 22030
(703) 591-4071

CERTIFICATE OF SERVICE

I hereby certify, under penalty of perjury, that on the 10th day of April, 1984, I mailed two typewritten copies of the foregoing Brief on the Merits of the Respondent Allan Wayne Morton, to the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, postage prepaid and properly addressed.


Kaletah N. Carroll

RESPONDENT'S APPENDIX

1. 5 U.S.C. § 5401, provides in relevant part:

(a)(1). When the head of an agency or his designee determines that an employee, member of the Armed Forces or Reserve of the Armed Forces, is indebted to the United States for debts to which the United States is entitled to be repaid at the time of the determination by the head of an agency or his designee***

(2) *** prior to initiating any proceedings under paragraph (1) to collect any indebtedness of an individual, the head of the agency holding the debt or his designee shall provide the individual with -

(A) a minimum of thirty days written notice, informing such individual of the nature and amount of the indebtedness determined ...to be due, the intention of the agency to initiate proceedings to collect the debt through deductions from pay, and an explanation of the rights of the individual ...

(B) an opportunity to inspect and copy Government records relating to the debt;

(C) an opportunity to enter into a written agreement... to establish a schedule for the repayment of the debt; and

(D) an opportunity for a hearing on the determination of the agency concerning

the existence or the amount of the debt***
 A hearing*** *** may not be conducted by an individual under the supervision or control of the head of the agency, except that nothing in this sentence shall be construed to prohibit the appointment of an administrative law judge.

2. Uniform Services Former Spouses Protection Act, 10 U.S.C. 1408,
provides in part:

Section (a) (1) 'court' means -

(a)"(A) any court of competent jurisdiction of any state****"

'Court order' means a final decree of divorce*** which -

(A) is issued in accordance with the laws of the jurisdiction of that court; ***

Section (b) (1) service of a Court order is effective if -

(B) "That Court order is regular on its face;"****

(D) The Court order or other documents served with the Court order certify that the rights of the member under the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U.S.C. App. 501 et seq.) were observed; and

(2) A court order is regular on its face if the order -

(2) (A) is issued by a Court of competent jurisdiction

(2) (B) is legal in form; and

(2) (C) includes nothing on its face that provides reasonable notice that it is issued without authority of law.

"(4) A Court may not treat the disposable retired or retainer pay of a member in the manner described in paragraph (1) unless the Court has jurisdiction over the member by reason of (A) his residence other than because of military assignment, in the territorial jurisdiction of the Court, (B) his domicile in the territorial jurisdiction of the Court or (C) his consent to the jurisdiction of the Court." Emphasis added.

(f)(1) The United States and any officer or employee of the United States shall not be liable with respect to any payment made from retired or retainer pay to any member, spouse or former spouse pursuant to a Court order that is regular on its face if such payment is made in accordance with this section and the regulations prescribed pursuant to subsection (h)."

3. Rule 4:2 of the Rules of the Supreme Court of Alabama, 1977, reads in pertinent part:

"PROCESS: BASIS FOR AN METHODS OF
OUT-OF-STATE SERVICE.

(a) Basis for Out-Of-State Service:

(1) When proper. Appropriate basis exists for service of process outside of this state upon a person in any action in this state when

(A) the person is, at the time of the service of process, either a non-resident of this state or a resident of this state who is absent from this state, and (Emphasis added)

(B) the person has sufficient contacts with this state, as set forth in (a) 2 of this rule, so that the prosecution of the action against the person in this state or the Constitution of the United States, or ***

(2) Sufficient Contacts. A person has sufficient contacts with the State when that person, acting directly or by agent, is or may be legally responsible as a consequence of that person's ***

(H) living in the marital relationship within this state, notwithstanding subsequent departure from this state, as to all obligations arising from alimony, custody, child support, or property settlement, if the other party to the marital relationship continues to reside in this state; or

(I) otherwise having some minimum contacts with this state and, under the circumstances, it is fair and reasonable to require the person to come to this state to defend an action. The minimum contracts referred to in this subdivision (I) shall be

deemed sufficient, notwithstanding a failure to satisfy the requirement of subdivision (A)-(H) of this subsection (2), so long as the prosecution of the action against a person in this state is not inconsistent with the Constitution of this state or the Constitution of the United States."

4. Letters from James R. Russell to Wayman G. Sherrer and letter from Caryl P. Privett to James R. Russell:

1 June 1977

JA

Morton v. Morton, (Tenth Judicial Circuit Court) No. 186-818

Wayman G. Sherrer
United States Attorney
200 Federal Building
1800 Fifth Avenue North
Birmingham AL 35203

Dear Mr. Sherrer

Enclosed herewith is a copy of a decree of divorce, and attendant thereto, an affidavit for service of process by certified or registered mail.

In short, the Circuit Court entered a decree of divorce which contained a \$500.00 per month alimony award based upon this service by certified mail. We are concerned as to whether this procedure secured the requisite "in personam" jurisdiction over Mr. Morton to lawfully support this alimony award.

Our records demonstrate that Mr. Morton was a domiciliary of the State of Alabama and at the time of service by certified mail was in the State of Alaska in Military service. In August 1976, his attorney advised him to change his state of domicile by paying taxes etc. in the new state. The records of the court demonstrate that the return receipt for service of process in the divorce action bore Mr. Morton's signature and was duly returned to the court. The decree of divorce specifically stated that "defendant was duly served".

We are currently in a position where we must determine the viability of this service of process in order to ascertain the effectiveness of a Writ of Garnishment to collect an arrearage for alimony.

Therefore, we respectfully request that you advise us if service of process by certified mail on a nonresident domiciliary of Alabama secures "in personam" jurisdiction so as to authorize the entry of a money judgment as was made herein.

JAMES R. RUSSELL
Office of the Staff Judge Advocate

June 7, 1977

James R. Russell
Office of the Staff Judge Advocate
Department of the Air Force
Headquarters Air Force Accounting
and Finance Center
Denver, Colorado 80279

ATTN of: JA

RE: Morton v. Morton, Tenth Judicial Circuit
Court, No. 186-818

Dear Mr. Russell:

Please be advised that under the circumstances as you related them in your letter of June 1, 1977, the service of process by certified mail was sufficient.

The pertinent law is encompassed in the Alabama Rules of Civil Procedure. Rule 4(b) states: "All process may be served anywhere in this state and, when authorized by law or these rules, may be served outside this state." A copy of Rule 4.2 which pertains to basis for and methods of out-of-state process is enclosed, the relevant portions are marked.

If you have any further questions, do not hesitate to contact me.

Very truly yours,

WAYMAN G. SHERRER
United States Attorney

BY: CARYL P. PRIVETT
Assistant United States Attorney

5. Air Force Document defining "Home of Record". See Plaintiff's Reply to Defendant's Reply to Plaintiff's Statement pursuant to Memorandum of Pre-trial Conference. DOD Form 2058, 1 February, 1977, in pertinent part:

"You should not confuse the State which is your "home of record" with your State of

legal residence/domicile. Your "home of record" is used for fixing travel and transportation allowances. A "home of record" must be changed if it was erroneously or fraudulently recorded initially.

Enlisted members may change their "home of record" at the time they sign a new enlistment contract. Officers may not change their "home of record" except to correct an error, or after a break in service. The State which is your "home of record" may be your State of legal residence/domicile only if it meets certain criteria."

6. Letter from Patricia Kay Morton to the Base Commander and letter from the Base Commander to Patricia Kay Morton. (From Exhibits to Objections and Responses to Defendant's Motion for Summary Judgment and Cross-Motion for Summary Judgment):

September 19, 1975 ²⁰

The Base Commander
Elmendorf A.F.B.,
Alaska.

Dear Sir:

Enclosed is a copy of the divorce decree awarded me on the 14th of August, 1975. This divorce was un-contested by Col. Allan W. Morton. Col. Morton has failed to send all money set aside by the courts. The decree states I am to receive \$500.00 per month beginning the date the divorce was granted. I have received only half the

amount specified by the courts. This amount is to be sent to me by Col. Morton whether or not the children are living with me. Col. Morton owes me \$250.00 for the month of August and \$250.00 for the month of September. He has also ignored the court cost incurred in the amount of \$350.00 payable to Mr. G.W. Nicholson, Attorney. I am asking your help in this matter as I am in a terrible financial bind at this time because of Col. Morton's failure to live up to his obligations to me and to his son Allan, who is living with me. (Our son Bryan is living with Col. Morton). Col. Morton feels that since Bryan is with him, that I should receive only half of the \$500.00, but according to the judge and my lawyer, the full amount of \$500.00 per month is due me.

If it is possible, could the child support/alimony be put in an allotment check to protect against Col. Morton's not sending a check each month? I think this could solve that problem.

Also, I would like for Col. Morton to send the proper papers for our son, Allan to have a new I.D. card made, as his expired in August.

I am sorry to have involved you in this matter, but I just didn't know any other way to go.

Allan W. Morton
CES
Elmendorf AFB

Sincerely,
Patricia K. Morton
849 Sherwood For. Dr.
Birmingham, Alabama.

28 Oct 1975

Mrs. Patricia K. Morton
849 Sherwood Forest Drive
Birmingham, Alabama 35275

Dear Mrs. Morton:

I have received your letter of 19 September 1975, along with a copy of Final Judgment of Divorce, dissolving your marriage to Colonel Allan W. Morton of this organization. Please accept my apology for not having replied before now, but the delay was due to the fact that I have been away on temporary duty elsewhere; and in my absence, Colonel Morton, being the next ranking officer in the 21 Air Base Group, assumed my role as Base Commander.

In regard to your request for help in the matter of Colonel Morton not furnishing the entire \$500.00 per month set forth in the divorce decree, I referred the question to my Staff Judge Advocate for advice, and after thorough study, he informs me that he does not have enough information to give me an absolutely definitive answer. Specifically, he states that he would need a copy of the petition for divorce; whether personal service was obtained on Colonel Morton within the State of Alabama; and, if not, whether Colonel Morton waived in writing, personal service; and finally, a copy of any separation agreement or property settlement agreement that may have been entered into.

In spite of the above, Colonel Morton is obligated to provide support for his two sons. I am advised that this is so not withstanding that one son is presently

residing with him in the absence of an amended decree or agreement between you and Colonel Morton, allowing him to assume full custody of the child residing with him. By not having the additional information described in the above paragraph it is difficult to determine exactly the amount appropriate. Hence, I must rely on a yardstick using terms such as "ability to provide," "reasonableness," and "station in life." Accordingly, I feel that you are entitled to more than \$250.00 per month and have advised Colonel Morton of such. Also, I have informed him of his obligation to furnish you with the appropriate documents to obtain a new ID card for your son, Allan.

It is possible to make support payments by allotment, however, that would have to be done on Colonel Morton's personal initiative as I have no authority to compel him to do so.

I am sorry I do not have the information to be more succinct in my answer, but trust this fully explains the Air Force position in such matters. Too, I sincerely hope that the hardship which you recited will be promptly alleviated to the satisfaction of all concerned.

Sincerely,

JAMES D. DUNN, Colonel USAF
Commander.

No. 83-916

Office - Supreme Court, U.S.

FILED

APR 18 1984

ALEXANDER L. STEVANS.

CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

ALLAN WAYNE MORTON

*ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FEDERAL CIRCUIT*

REPLY BRIEF FOR THE UNITED STATES

REX E. LEE

Solicitor General

Department of Justice

Washington, D.C. 20530

(202) 633-2217

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UNITED STATES OF AMERICA, PETITIONER

v.

ALLAN WAYNE MORTON

*ON WRIT OF CERTIORARI TO
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REPLY BRIEF FOR THE UNITED STATES

1. The persistent theme of respondent's brief, beginning with his "correction of the question presented," is to claim that the Air Force "knew" at the time of the garnishment that the Alabama judgment was "void" (Resp. Br. i, 1, 4, 15, 16, 19, 20, 22, 27, 33, 62). This is a revealing mischaracterization of the case,¹ because it demonstrates the fallacy at

¹Respondent cites the trial judge's opinion (Pet. App. 66a) for the proposition that "[t]he Air Force also knew all of this prior to the taking of Col. Morton's pay" (Resp. Br. 19). The opinion, however, merely states that respondent "took the position before the Finance Office" that the garnishment writ was invalid for various reasons (Pet. App. 66a). We agree that the Air Force was on notice that respondent *believed* the judgment was void; that is a far cry from "know[ing]" it was void.

Indeed, a letter from James R. Russell, who was assigned to handle respondent's case, is quoted by respondent and reprinted at Resp. Br. App. 5a-6a. It shows that Russell "knew" — or at least thought he knew — that respondent was a domiciliary of Alabama at the time of service

the heart of respondent's position: he expects government disbursing agents to be able to second-guess state court judgments reasonably and reliably. Respondent assures us it is a simple process to determine personal jurisdiction; all that is needed is to require the garnishor's attorney to submit "two additional authenticated sheets of paper" (Resp. Br. 66). But if this case is typical (and we have no reason to doubt it), the question of personal jurisdiction can involve a bewildering array of murky factual and legal questions. See note 1, *supra*. Even blessed with a fuller factual record than that available to the Air Force, the Alabama courts decided the jurisdictional question one way and the court of appeals (by a 2-1 vote) decided the question the other.

A government disbursing officer lacks both the factfinding and the legal capacity to resolve issues of this sort, and we can see no reason why he should be expected to do so. By the time a garnishment writ is served on the government, a

of the writ, and that respondent's counsel had advised respondent as late as August 1976 that he should change his domicile to Alaska. It also shows that Russell "knew" that the return receipt for service of process in the divorce action bore respondent's signature and was duly returned to the court. *Id.* at 6a. And, after receiving advice from the United States Attorney in Alabama, Russell "knew" that service of process by certified mail was sufficient under Alabama law — the only issue that seemed to be in doubt. Resp. Br. App. 7a. To these pieces of information could be added the facts that respondent paid personal income taxes in Alabama in 1973 and 1974 (Pet. App. 92a-93a) and that he registered an automobile in Alabama (*id.* at 93a).

The point of this is not that respondent is distorting the facts; he can cite equally persuasive "facts" to show that he was not domiciled in Alabama, subject to its jurisdiction, or duly served. See Resp. Br. 18-19. The point is that questions of personal jurisdiction are difficult to resolve: the facts frequently are disputed and conflicting and the legal judgments often involve close questions of law. It is fair to conclude, however, that the Air Force did not "know" that the Alabama judgment was void.

state court has already decided that it had jurisdiction to issue it. It is sound practice to allow — indeed, require — employers, including federal agencies, to honor state court writs in the absence of defects apparent on their face. The state court admittedly might have erred, but its decision provides reasonable assurance that the garnishment is lawful. It is unseemly to put the federal government in the position of deciding unilaterally whether a state court correctly decided the question of its own jurisdiction, as respondent suggests.² Until the state court judgment is set aside, the disbursing agents should not be expected to uncover latent defects in the legal process.

2. Several unsupported assertions of law in respondent's brief should be noted. First, citing 6 Am. Jur. 2d *Attachment and Garnishment* § 357 (1963), and *Stewart v. Northern Assur. Co.*, 45 W. Va. 734, 32 S.E. 218 (1898), respondent claims that a garnishee "has a duty to assert all proper defenses of its creditor of which the defendant has knowledge" (Resp. Br. 61-62). This proposition, if true, would conflict with our statement (Gov't Br. 14) that the duties of a garnishee are, at most, to notify the principal debtor of the proceeding, if he has not otherwise been notified, to answer

²Respondent's approach (Resp. Br. 62-64) would avoid forcing the government to take sides in the underlying litigation only by denying the employee's spouse and children their rights under Section 659, purely on the basis of a unilateral decision by the disbursing officer that the state court erred on the question of its jurisdiction. The spouse and children would be relegated to remedies, such as the Uniform Reciprocal Enforcement of Support Act, 9 U.L.A. 643 (1979), which — whatever respondent's opinion may be (Resp. Br. 80) — have explicitly been found ineffective by Congress. See Gov't Br. 38-39. In any event, it is far more likely that the government's refusal to comply with the writ would be treated as an "answer" or "return" under state law, leading to litigation by the government against the needy spouse and children (Gov't Br. 44 & n.34) — a consequence even respondent agrees is undesirable. See Resp. Br. 63 ("The government * * * should not take sides [in the litigation] at any time.").

the summons, to state whether he owes money or property to the principal debtor and, if so, the amount, and to comply with the writ. The authorities cited by respondent do not, however, even remotely support his contrary view.³ The cited section of Am. Jur. states only that "[t]here is authority that the garnishee *may* interpose any defense available to the principal defendant" (6 Am. Jur. 2d, *supra* § 357, at 811 (emphasis added)).⁴ And *Stewart* holds — in accord with our position — that "it is clearly the duty of such garnishee, if practicable, to *notify* his creditor of the proceedings." 45 W. Va. at 738, 32 S.E. at 220 (emphasis added). *Stewart* does not require the garnishee to "assert" the defenses of his creditor, as respondent claims.

Respondent contends that Ala. Code § 6-6-461 (1977) and the 31 similar state statutes cited in our brief, which expressly protect garnishees from subsequent liability for reimbursement to the principal debtor (Gov't Br. 12-14 & n.9), "are predicated upon the fact that the court issuing the original judgment had jurisdiction of the person and the subject matter" (Resp. Br. 45; see also *id.* at 46-47). However, respondent cites no authority for this interpretation. As we pointed out (Gov't Br. 19), and respondent concedes (Resp. Br. 48), only one reported decision in one state (Illinois) has been found that would support respondent's implied exception to the unambiguous language of these statutes.

Respondent also continues to assert, without citation of authority, that a "court without jurisdiction of subject

³Nor does respondent attempt to refute or distinguish the authorities cited in our opening brief.

⁴Another statement in Am. Jur. concerning the garnishee's "duty to assert all proper defenses of which he has knowledge" (*ibid.*) refers in context to the garnishee's *own* defenses, and his ability to obtain relief in equity if he subsequently attempts to challenge the garnishment order. It has no reference to a garnishee's rights vis-a-vis the principal debtor.

matter *or a party*" is not a "court of competent jurisdiction" (Resp. Br. 47-48 (emphasis added)) within the meaning of 42 U.S.C. (Supp. V) 662(e)(1).⁵ But the government's opening brief showed that "competent jurisdiction" in many contexts means subject matter jurisdiction alone. Gov't Br. 26. The actual meaning can be determined only from context — and in this context, where the competence of the court must be discernible from the face of the process, it is apparent that the term refers only to subject matter jurisdiction. Gov't Br. 27-28. Respondent provides neither authority nor argument to the contrary.

3. Respondent attempts to sidestep the question of statutory construction in this case by arguing, contrary to the factual premise of the decision below, that the garnishment writ served on the Air Force in this case was not regular on its face. Apparently, this is because the statement in the judgment of divorce that respondent had been "duly served" (Pet. App. 38a) was "ambiguous" (Resp. Br. 26), or because the Air Force should have examined the return of process in the underlying divorce action — a document that is not required to be provided to the government and apparently was not provided here (see 5 C.F.R. 581.202) — to determine whether it was in accord with state law.

This Court need not review the issue of the facial regularity of the writ. The trial judge, who was called upon to resolve "whether the legal process served on the United States on behalf of Patricia Kay Morton was regular on its face" (Pet. App. 67a) found as a fact that "[t]he writ of garnishment was issued on the regular form used by the State of Alabama" (*id.* at 90a; see also *id.* at 78a). Similarly, the court of appeals found that the writ was regular on its

⁵ Respondent's arguments that the garnishment writ was not for alimony or child support (Resp. Br. 3-4, 31) and that it was not brought to enforce a "legal obligation" (*id.* at 4, 27-28, 30) are merely reformulations of this same point. See Gov't Br. 22-23 n.19.

face. The court noted that "where the process document is regular on its face" the government may rely upon it unless the government had notice of a substantial claim of jurisdictional irregularity. "That is the case here." Pet. App. 17a. In any event, respondent's attenuated argument goes well beyond the usual understanding of facial regularity. See *Calhoun v. United States*, 557 F.2d 401, 402 (4th Cir.), cert. denied, 434 U.S. 966 (1977); *Aetna Insurance Co. v. Blumenthal*, 129 Conn. 545, 553, 29 A.2d 751, 754-755 (1943); *In re Technical Sergeant Harry E. Mathews, USAF*, File No. B-203668 (Comp. Gen. Feb. 2, 1982) (Pet. App. 108a-111a).⁶

4. Respondent's primary emphasis is on the supposed due process problems lurking in the government's straightforward interpretation of the garnishment statute. Our initial brief explained why there are no such problems (Gov't Br. 31-33). Respondent has confused due process limitations on state court personal jurisdiction with the appropriate remedy for violations. We do not question here that the Alabama decree of alimony and child support violated due process;⁷ but it does not follow that the federal government, in its capacity as garnishee, a disinterested

⁶Moreover, respondent virtually concedes the point when he states (Resp. Br. 24): "Nowhere on a writ of garnishment alone can it be determined that it was issued pursuant to legal process by a court of competent jurisdiction." The jurisdictional defect in this case, as respondent points out (Resp. Br. 66), could be discovered only upon examination of *additional* documents.

⁷In actuality, we have serious doubts that the court of appeals was correct in its holding that the Alabama court lacked personal jurisdiction. See Gov't Br. 11 n.8. We have not presented this essentially fact-bound question to this Court for review. We will therefore assume, for purposes of the argument above, that the Alabama judgment was in derogation of respondent's due process rights.

stakeholder, must be required to make respondent whole.⁸ If respondent has a claim, it is against the plaintiff in the action, his former spouse. *Betts v. Coltes*, 467 F. Supp. 544 (D. Hawaii 1979). Respondent deliberately chose, on advice of counsel, not to defend his interests in the Alabama actions.⁹ He thus "risk[ed] a default judgment" (*Insurance Corp. of Ireland, Ltd. v. Compagnie Des Bauxites de Guinee*, 456 U.S. 694, 706 (1982)) and has no constitutional right at this juncture to shift his losses to his employer.

For the foregoing reasons and those stated in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

REX E. LEE
Solicitor General

APRIL 1984

⁸By notifying him of the proceeding, the government discharged its duties to respondent. See Gov't Br. 14-16, 18-19. While adequate *service of process* is central to the issue of personal jurisdiction, as respondent correctly observes (Resp. Br. 42), the duty of the garnishee is simply to give *notice*.

⁹In addition to his other procedural and substantive rights, respondent could have moved, pursuant to the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. App. 520(4), 521, 523, for a stay of the Alabama action or its execution, or to reopen the proceedings after judgment. He did not invoke these rights. If, as respondent claims (Resp. Br. 64 n.3), "the great probability is that this case would not have been necessary" had the procedures of the Act been followed, he has only himself to blame.

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NO. 83-916

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

UNITED STATES OF AMERICA,
Petitioner

v

ALLAN WAYNE MORTON,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

BRIEF OF AMICUS CURIAE IN
SUPPORT OF RESPONDENT

AND
MOTION FOR LEAVE TO FILE
AMICUS CURIAE BRIEF

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Bruce Warren Rush

NO. 83-916

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

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Petitioner

v

ALLAN WAYNE MORTON,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED
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THE FEDERAL CIRCUIT

MOTION FOR LEAVE TO FILE
AMICUS CURIAE BRIEF

Pursuant to Rule 36.3 of this Court
Bruce Warren Rush hereby moves for leave
to file an Amicus Curiae in this case
and accompanies this motion with 40 copies
of the proposed brief.

This Amicus Curiae brief which Mr. Rush hereby submits, supports Col. Morton's position in this litigation, although Col. Morton's attorney in this case (for reasons not clearly understood by Mr. Rush) has not yet consented to such filing even though the Solicitor General has consented. As a result this motion for leave to file is required.

I

"Facts and questions of law that have not been" and "reasons for believing they will not adequately be presented by the parties" are:

A. The constitutional limitations imposed by the Fifth Amendment on any asserted claim of sovereign immunity in the Morton Case under 42 USC 659.

B. The substantial jurisdictional defect in the Alabama garnishment order itself caused by a lack of sub-

ject matter jurisdiction over Col. Morton's salary earned, payable and located in Alaska.

As also stated in the Summary of Argument in the brief below, an examination by Rush of the litigants briefs discloses that the litigants are concentrating on the following:

C. The lack of personal jurisdiction as a substantial jurisdictional in the underlying judgment, and

D. Limitations imposed on sovereign immunity by judicial decision and interpretation in 708 F 2d 659 under 42 USC 659.

A review of the briefs indicates that the litigants are not adequately presenting the issues as stated in paragraphs A and B above; yet, the Morton Case decision can be affirmed on the basis of paragraphs A and B or C and D.

In addition as a safety precaution Mr. Rush prefers to have Col. Morton succeed on all four issues, A, B, C and D.

II

Mr. Rush supports the decision in the Morton Case and it is in his best interest to do so, because:

1. If this court affirms the Morton Case in 708 F 2d 68 or writes an opinion similar to it, then "in the interest of justice" under the doctrines of this in Gondeck v Pan American World Airways, (1965) 382 U.S. 25,27 this court has the power to and should reverse its 1984 decisions in the Rush Case(below) in which it has recently denied certiorari and rehearing. See also: U.S. v Maryland for Meyer, 382 U.S. 158 and the Levin Case in 381 U.S. 41; U.S. v Ohio Power Co., (1957)353 U.S. 98.

2. In this Morton Case (No. 83-916; 708 F 2d 680) certiorari was grant-

ed on Feb. 23, 1984 and oral argument is scheduled for April 25, 1984. The Morton Case is in direct conflict on critical constitutional issues with the Rush Case (in No 83-382 in this Court) in which this Court denied certiorari on Jan. 9, 1984 and denied rehearing on Feb. 27, 1984.

CONCLUSION

A favorable decision in the Morton Case can result from different combinations of the four issues outlined above in A, B, C and D and can result in affirming the Morton Case as reported in 708 F 2d 680. Issues A and B should not be neglected, and they are covered by the following Amicus Curiae brief by Mr. Rush.

Wherefore, Mr. Rush by this motion asks this Court to approve the filing of his Amicus Curiae Brief.

Respectrully submitted,

Daniel B. Blake

DANIEL B. BLAKE, III

Attorney for Mr. Bruce
Warren Rush, Amicus
Curiae

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NO. 83-916

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

BRIEF OF AMICUS CURIAE IN
SUPPORT OF RESPONDENT

Mr. Bruce Warren Rush, the AMICUS CURIAE
listed on the cover of this brief specif-
ically requests to affirm the Morton Case in
the United States Court of Appeals for the
Federal Circuit as reported in 708 F 2d
680.

Pursuant to Rule 36 of this Court this Amicus Curiae brief is submitted in support of the respondent, Col Morton, accompanied by a Motion for leave to file this Amicus Curiae brief pursuant to Rule 36.3.

_____ o _____

OPINION BELOW

The opinion of the Court of Appeals in this case is reported in 708 F2d 680, and a statement of the case is on page 682 and in column 1 on page 683 of that report.

The Appellate Court below decided: (I) that the United States was not entitled to immunity from suit (and from liability to Col. Morton) for deductions made from his salary pursuant to a void garnishment order of an Alabama Court; and, (II) that the U. S. Government was obligated to make restitution to Col. Morton for its part in confiscating Col. Mor-

ton's salary in violation of the Fifth Amendment by honoring an order or writ:

(1) when substantial jurisdictional defects are involved in the garnishment order (a) because of such defects in the underlying judgment, or (b) because of such defects in the garnishment order itself (such as a lack of subject matter jurisdiction over Col. Morton's salary), and

(2) when before making the deduction the U. S. Government was notified of a jurisdictional defect which was substantial.

STATEMENT OF INTEREST

Mr. Rush's interest in filing this brief follow:

1. Not only does Mr. Rush support the decision in the Morton Case in 708 F 2d 680 but it is in his best interest to do so, because:

a. If this Court affirms the Morton Case in 708 F 2d 680 or writes an opinion similar to it, then "in the interest of justice" under the doctrine of this Court in Gondeck v Pan American World Airways, 382 U.S. 25, 27 this Court has the power to and should reverse its 1984 decision in the Rush Case (below) in which it has recently denied certiorari and rehearing.

b. In this Morton Case (No. 83-916; 708 F 2d 680) certiorari was granted on Feb. 23, 1984 and oral argu-

ment is scheduled for April 25, 1984. The Morton Case is in direct conflict on critical constitutional issues with the Rush Case (in No. 83-382 in this Court) in which this Court denied certiorari on Jan. 9, 1984 and denied rehearing on Feb. 27, 1984.

c. This reversal of the Rush Case as suggested in a above could be done (1) suo sponte, (2) by a second petition for rehearing as in the Pan American Case, or (3) by granting a conditional petition for rehearing pending the outcome of the Morton Case; and at about the time of oral argument in the Morton Case we suggest that this Court suo sponte make arrangements for granting such a conditional rehearing in the Rush Case, which it has power to do. See: U.S. v Maryland for Use of Meyer, 382 U.S. 158 and Levin Case in 381 US 41. Also See: U.S. v Ohio Power Co., 353 U.S. 98.

d. In Gondeck v Pan American Case
(above) in 382 U.S. at pp. 26-27 this

Court stated:

"We are now appraised... of 'intervening circumstances of ... substantial ... effect' (Rule 58(2)), justifying application of the ... doctrine that 'the interest of finality'... must yield where the 'interests of justice' would make unfair the strict application of our rules ...(a)nd... this petitioner stands alone in not receiving (compensation and justice)."

e. In U.S. v Maryland for the Use of Meyer, (above) 382 U.S. 158 this Court granted conditionally a second rehearing pending its review of a similar but conflicting case. It later reversed its earlier decisions after that review.

SUMMARY OF ARGUMENT

There are four pivotal issues in-
in the scope of the Morton Case in 708
F 2d 680 which are concisely stated in
in the two parts of the the two follow-
ing sentences.

Limitations on Soverign Immunity

1. In addition to confirming a limitation imposed on U.S. sovereign immunity by judicial decision as was done in 708 F 2d 680 under 42 USC 659, --
2. This Court can and should by judicial decision also confirm a Fifth Amendment constitutional limitation on sovereign immunity by estopping the U.S. Government^{*} from asserting it when a party like Col. Morton seeks restitution from the U. S. Government or its officers for confiscat-^{*} his salary (by garnishment in violation of the Fifth Amendment). This point is
*ing

emphasized in Iof the Argument below.

A Substantial Jurisdictional
Defect

3. As reported in the Morton Case in 708 F 2d 680 the lack of personal jurisdiction over Col. Morton in the underlying judgment can cause a substantial jurisdictional defect in the garnishment order, but in addition, --

4. There can be a substantial jurisdictional defect in an Alabama garnishment order itself (such as a lack of subject matter jurisdiction over Col. Morton's salary earned, payable and located in - Alaska) which make the U. S. Government liable for restitution, if it was notified of the probable defect before confiscation. This point is emphasized in paragraph II of the Argument below.

ARGUMENT

Pursuant to the Summary of Argument above, this Argument and this Amicus Curiae Brief concentrate on two basic concepts: I. The The Fifth Amendment Imposed Limitation On Any Asserted Sovereign Immunity Issue In The Morton Case, and II. The Substantial Jurisdictional Defect In The Alabama Garnishment Order Itself caused by a lack of subject matter jurisdiction over Col. Morton's salary. They are analyzed below.

I

THE FIFTH AMENDMENT IMPOSES A
CONSTITUTIONAL LIMITATION
AGAINST THE U. S. GOVERNMENT
ASSERTING SOVEREIGN IMMUNITY
IN THE MORTON CASE UNDER
42 USC 659

In the past this Court has continued its practice of protecting the rights individual citizens against the uncontrolled arbitrary power of government and its officers and it has done so by inter-

preting and refining the meaning of the due process clause under the Fifth Amendment. To do otherwise will undermine the basic protections intended by the Amendment. Accordingly this Court should estop the U. S. Government from asserting sovereign immunity in this Morton Case in which his salary is being confiscated by the government and its officers under 42 USC 659. This is especially so when (as here) the Congress took affirmative action by enacting 42 USC 659 and as a result inaugurated, initiated and induced the salary confiscation by its federal officers. In support of the above, note and analyze the following:

1. See and review the "Limitations of the Rule" imposed by judicial decision in U. S. v Lee in 106 US 196, 1 S Ct 240 and note in particular paragraphs 5, 6, 7, and 8 in the summary on page 240 of

this long opinion written in 1882.

2. Note also the severe limitations placed on the Rule in Kawananakoa v Polybank, 1907) in 205 U.S. 349, 27 S Ct 526, 527 which is quoted below:

"A sovereign is exempt from suit, not because of any formal conception of obsolete theory, but on the on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."

Note it can be stated that for Col. Morton the law and authority on which his right to protection* is the Fifth Amendment and its due process clause which protects his salary against confiscation.

3. While this court may prefer to allow the Congress to develop routine exceptions to the rule we believe that this court has the constitutional duty to explicitly confirm these constitutional limitations in this Morton Case to which they apply.

* is based

II

A SUBSTANTIAL JURISDICTIONAL
DEFECT IN THE GARNISHMENT ORDER
ITSELF

1. It can be asserted in the Morton Case: a. That (irrespective of personal jurisdiction) the Alabama Garnishment Order (or Writ) was void and invalid in itself because the Alabama Court which issued it lacked subject matter jurisdiction over Col. Morton's salary which was earned , payable and located in Alaska, and b. That the U. S. Government was legally liable to Col. Morton under the Fifth Amendment for any confiscation or unlawful withholding of Col. salary after Col Morton notified the U.S. Air Force of the potential jurisdictional and substantial jurisdictional defect.

2. The following points and authorities should be noted:

a. Even if the underlying judgment was perfectly valid; nevertheless,

an Alabama garnishment (or writ) here would be unconstitutional (under the Fifth Amendment) for lack of subject matter jurisdiction over Col. Morton's salary earned, payable and located in Alaska. (See: Morton v U. S., (1982) 708 F 2nd 680, 689, Note 10)

b. As stated at page 686 of this Morton v U. S. Case (708 Fed 2nd 680, 686 (2):

"... Competent jurisdiction... means both subject matter jurisdiction and persona jurisdiction." and

"...constitutional requirements of of due process have long been applied to garnishment procedures, citing (cases)".

c. Note 38 C. J. S. page 327 and Robinson Coe v ROTex Inc., 320 NE 2d 157, 161 (6) which state in effect that:

"Jurisdiction of ... (Col. Morton) is not enough without jurisdiction of the res(or salary)."

d. Also see Worldwide Volkswagen v Woodson, 444 U.S. 286, 296; 62 LEd 490, 501 where Justice Byron White stated:

"... We recently abandoned the outworn rule of Harris v Balk, (1905), 198 US 215, 49 LEd 1023, ... that the interest of a creditor in a debt could be extinguished or otherwise affected by any State having transitory jurisdiction over the debtor ..." (even under circumstances in which the U.S. Air Force was doing business in Alabama)"

CONCLUSION

For all of the foregoing reasons, Mr. Rush, as Amicus Curiae on this brief asks this Court to affirm the decision of the United States Court of Appeals for the Federal Circuit as reported in U. S. v Allan Wayne Maoton in 708 F 2d 680.

Respectfully submitted,

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MAR 12 1984

ALEXANDER L. STEVAS
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No. 83-916

In the
Supreme Court of the United States
October Term, 1983

UNITED STATES OF AMERICA,

Petitioner,

vs.

ALLEN WAYNE MORTON,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF AMICUS CURIAE SACRAMENTO
COUNTY CALIFORNIA AND SACRAMENTO
COUNTY DISTRICT ATTORNEY IN
SUPPORT OF PETITIONER

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**BRIEF OF AMICUS CURIAE SACRAMENTO
COUNTY CALIFORNIA AND SACRAMENTO
COUNTY DISTRICT ATTORNEY IN
SUPPORT OF PETITIONER**

The Amicus Curiae listed on the corner of this brief more specifically request this court reverse the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 708 F2d 680. The opinion of the Court of Claims is not reported. For the sake of brevity this brief will cite excerpts from the case in the brief of Petitioner for a writ of certiorari previously filed with this court, the case being reported in full in that brief.

STATEMENT OF INTEREST

The Sacramento County District Attorney¹ is the law officer of the County of Sacramento (a political subdivision of the State of California) authorized to enforce child support orders. (See 11475.1, California Welfare and Institutions Code; Section 4702 California Civil Code.) The deputy district attorneys appearing on this brief, Mr. Michael E. Barber² and Mr. Dan M. Kinter³, are in fact

-
1. This brief is submitted by the Chief Law Office of Sacramento County California and therefore under Supreme Court Rule 36.4 no motion or written consent is necessary for its submission.
 2. Mr. Barber, the author of this brief, has been employed in this capacity for sixteen years; he has served as President of the California District Attorney's Family Support Council (1972); a member of the Council of the Family Law Section of the American Bar Association; a Director of the National Reciprocal and Family Support Enforcement Association; and is presently a member of the Executive Committee of the California Bar Association's Family Section. He regularly writes a column for "Fair Share" a monthly newsletter on family law of Harcourt Brace Jovanovich. He has acted as a consultant and lecturer on paternity and child support enforcement for the U. S. Department of Health and Human Services, National District Attorneys Association, California's Continuing Education of the Bar, The American Association of Blood Banks Parentage Testing Committee, The American Bar Association's National Institute and The National Council of Juvenile and Family Court Judges. Mr. Barber was given an award for his outstanding contribution to prosecution by the California District Attorney's Association in 1977, and the Truly B. Knox Award from the California District Attorney's Family Support Council for his outstanding contribution to the child support enforcement program in 1979. His articles on child support have been published in the California Prosecutor's Brief and Family Law publications of the California Continuing Education of the Bar.
 3. Mr. Kinter is a member of the U. S. Supreme Court Bar.

assigned to the Domestic Relations Division, the Division of the Sacramento County District Attorney's Office specifically responsible for enforcement of child support orders.

The responsibilities of this office include preparation of garnishment process on civil support orders. There are in excess of 30,000 cases for which this office is responsible for proof of parentage or enforcement of support. Sacramento County files in excess of 700 writs of execution for past due child support, and 500 wage assignment (Section 4701 California Civil Code) for a combination of past and current child support per year. Both forms of process are post judgment garnishments. In addition, the Sacramento County District Attorney is responsible for entry and enforcement of orders under the Uniform Reciprocal Enforcement of Support Act (Sections 1674, 1680, 1681, and 1684, California Code of Civil Procedure). As the law officer given this responsibility, the Sacramento County District Attorney, and the political subdivision that provides the funding for this activity (the County of Sacramento), have a direct and immediate interest in the outcome of this case. The substance of the action, garnishment of the active duty pay and retirement pay of military members and federal employees in general for past due child support, constitutes no small part of this enforcement activity. During the first year the waiver of federal sovereign immunity was in effect under PL 93-647, 1975, this office identified in excess of \$500,000 in unpaid child support resulting from orders entered in the Sacramento County Superior Court due from actively employed or retired federal employees. The decision of this court in this matter will not be con-

fined in its impact to cases involving present and retired federal employees. The same enforcement concepts applied to Col. Morton have applied equally to employees of Signal Oil, Texaco Oil, and ARAMCO (*see cases infra*). In this District Attorney's Office, garnishments involving interstate corporations have been levied on wages of employees of Hughes Tool, United Airlines, and Republic National Insurance Company. Should this court choose to uphold what we consider an erroneous opinion of the Circuit Court, it will significantly increase the burden of litigation and decrease significantly the protection that now exists for children deprived of support.

SUMMARY OF ARGUMENT

Amicus curiae joins petitioner and supports petitioner's position that a facially valid writ of garnishment of a state court for child support protects the federal government, or any garnishee, from liability for reimbursement if it is later held the state court lacked sufficient jurisdiction over the employee to enter the order.

However, it is the position of amicus curiae in fact the state court did not lack jurisdiction and the Court of Claims incorrectly decided this legal issue. There were in this case four separate basis for personal jurisdiction, any of which could have applied to this case. The first is domicile, the second is purposeful use of the jurisdiction, the third quasi in rem, and the fourth is estoppel.

In taking this position, amicus curiae will offer authorities interpreting this court's prior holding in *Kulko*

v. Superior Court (1978) 436 U.S. 84 as they apply to this fact situation. In summary, these citations will present to the court fact situations where when the family has been deliberately sent to, or forced to return to, a jurisdiction with which there had been previous contact the courts have found purposeful use of that jurisdiction's facilities sufficient to provide minimum contacts as that term is used in the *Kulko* case.

It is recognized this court in *Kulko* also required a consideration of what will be a fair forum and looked to the Uniform Reciprocal Enforcement of Support Act to provide that forum. It is amicus curiae's position that reliance on that procedural vehicle to provide a "fair forum" is mistaken. Given the disparate economic circumstances of custodial and non-custodial parents, the intendment of the constitutional mandate of due process in this context is to favor the residence of the custodial parent in choosing a fair forum. Otherwise, the injury to the children of a separated family and the taxpayers who all too often end up supporting them is, in practice, irreparable.

Amicus curiae will argue that seizure of property central to the issue of support for children, that is a portion of the paycheck or pension of the obligated parent is a proper jurisdictional basis to enter a support order and has been sanctioned as such by federal courts, and including this court, both in family law cases and in its endorsement of URESA as a procedural vehicle.

Finally, on the issue of jurisdiction, it will be argued that the respondent, Col. Morton, ought to be estopped from denying the validity of the Alabama support order.

His successful completion of his military career was benefited by the method of enforcement of that order chosen by Mrs. Morton. Had she chosen a more direct method of enforcing Col. Morton's obligation to support his children, his military career would have been jeopardized.

As a third and separate issue, *amicus curiae* wishes to address dicta of the Circuit Court challenging the ability to garnish wages or pensions to enforce support orders. In so doing, we will argue the Circuit Court has either ignored or been uninformed as to constitutional law and established practice dating back to the turn of the century. In its opinion, the Circuit Court alleges an absence of authority to garnish in the state of Alabama. Yet a clear and relatively recent decision of that state's Supreme Court is clearly in support of the garnishment procedure used in this case. Other authority will be presented concerning the due process and full faith and credit considerations related thereto. Because this matter will be before the Supreme Court in the dicta of the court of appeals, *amicus curiae* will present authority supporting the constitutional basis and practical protections afforded by the garnishment procedure applied in this case.

More specifically, *amicus curiae* will establish that the court had continuing jurisdiction to enforce its order and that it is universally recognized, even in Alabama, that a court has jurisdiction over the paycheck of a non-resident judgment debtor if the judgment debtor's employer does business in the garnishing jurisdiction. *Amicus curiae* will also argue that sufficient safeguards are in the law to prevent an unwarranted burden on the support debtor, particularly when balanced against the needs

of that debtor's children. Finally, *amici curiae* will offer rebuttal to the circuit court's dicta which suggests procedures under URESA could in some way substitute for this expeditious process.

ARGUMENT

I.

A Garnishee May Rely On Garnishment Process That Is Fair On Its Face.

42 U.S.C. (659(f) giving the United States immunity from suit if garnishment process is "regular on its face" does nothing more than state the general rule applicable to private persons and nothing less. The effort by the Court of Claims and the Circuit Court to construe the term "court of competent jurisdiction" as an additional item into which the federal government must inquire, distorts the plain meaning and intent of the waiver of sovereign immunity by the United States. This subject's monies due from the United States "in like manner and to same extent as if the United States . . . *were a private person*, to legal process" (emphasis added) brought for the enforcement of child support or alimony (42 U.S.C. (Supp V) 659(d)).

The decision below ignores the term "private person", language found in PL 93-647. This term was never repealed, notwithstanding the expansion of the waiver of sovereign immunity to the District of Columbia and the expansion of the original statute to include a number of definitions.

The responsibility of a private person who is a garnishee has been repeatedly defined in case law and in statute. Under the recently enacted California Creditor's remedies legislation, the creditor is given full and complete immunity from liability so long as he complies strictly with "any written order or written notice which purports to be given or served in accordance" with the chapter on garnishment, "unless the employer has actively participated in a fraud" (Section 706.154(b) California Code of Civil Procedure). The comment of the California Law Revision Commission on the purpose of such language is as follows:

"The employer is not required in such circumstances to go beyond the document itself and is not subject to liability when he complies with its directives, and is not actively participating in a fraud. The remedy of the injured party in such a case is to proceed against the person who . . . improperly obtained the document . . . " (Deerings Annotated California Codes, Code of Civil Procedure, Volume 661-711, page 494).

This statute provides as one of the requirements of the employer that he deliver to the employee notice of the garnishment, deemed in the statute an "earnings withholding order", and a notice of his rights (Section 706.104 California Code of Civil Procedure).

This statute is nothing more than a statement of the case law and accepted practice in this context. *Harris v. Balk* (1905) 198 U.S. 215 makes it clear that the judgment debtor's due process rights are complied with so long as the debtor is given sufficient notice to permit him to defend himself. Subsequent cases go even further. *Blue v. Superior Court* (1956) 305 P2d 209 at 213 states:

"No one except the judgment debtor may move to quash a writ of execution unless the judgment on which it is issued, or the writ, is void on its face." (Also note *Vest v. Superior Court* 294 P2d 988, for the same proposition.)

In *Associated Oil Co. v. Mullin* (1930) 294 P 421 at 423, the court discusses the right of strangers to collaterally attack a void judgment:

"A void judgment, however, may be collaterally attacked either by the parties or by strangers. With respect to parties and privies such an attack is ordinarily limited to cases where the judgment is void on its face. . . . But neither the parties, their privies, nor strangers can attack a judgment of a domestic court of record on jurisdictional grounds unless the want of jurisdiction appears on the faces of the record."

Such language raises a serious question as to the appropriateness of this suit.

Finally, in the case of *Agnew v. Cronin* (1957) 306 P2d 527, the court reviewed the duties of a garnishee at length. That case states the position of the stake holder is considered that of a totally neutral individual who discharges his obligation to the debtor by giving him notice and by following the law as stated in the process served on him. The United States has fully complied with its obligations to each in this instance. The Circuit Court ought to be reversed and this action dismissed.

II.

The Alabama Court Had Jurisdiction. The Order Was Not Void.

It is further the position of *amicus curiae* that the order in this instance was valid and that the Court of Claims

and the Circuit Court both misapplied the rule of *Kulko v. Superior Court* (1978) 436 U.S. 84. This significant case on divorce and jurisdiction has spawned considerable progeny since its pronouncement, many cases apparently ignoring its limitations or extending it far beyond its original scope. Thus the Illinois Supreme Court ignored footnote 9 therein in *Boyer v. Boyer* (1978) 383 NE2d 223 and required Mrs. Boyer to return to Georgia to enforce a support order notwithstanding the clear pronouncement of this court in that footnote that a valid and final support order could be enforced in any court in this land. (See also *Morrill v. Tong* (1983) 453 NE2d 1221 where the Massachusetts Supreme Court determined, based on *Kulko*, that suit for enforcement of a Rhode Island divorce order could not be maintained, that Rhode Island was a "fairer forum", notwithstanding the fact the defaulting obligated parent had less contact with Rhode Island than the moving party. The defaulting parent was residing in Spain.) The opinion of the court of claims also failed to properly interpret *Kulko*.

A. Domicile

Jurisdiction over Col. Morton could, among other grounds, be based on domicile. It appears clear that if Col. Morton were a domiciliary of Alabama at the time of the divorce, there would be no jurisdictional question (Pet. Brief, 67a). The important date as to domicile in this action is not the date of the judgment, but the date of service. 21 C.J.S. p. 144 states as follows:

"Where jurisdiction of the person or of the res has once attached, it is not defeated by a removal of the person of the res beyond the jurisdiction of the court."

Jurisdiction was not affected by the subsequent erroneous dismissal and reinstatement of the action (Pet. Brief, page 89a). 21 C.J.S. p. 148 states:

"The rendition of an erroneous judgment which has been vacated after the ascertainment of errors does not deprive the court of jurisdiction to render a proper judgment."

Nor does the failure to file appropriate documentation of Col. Morton's military service (Pet. Brief, 89a). Affect jurisdiction to garnish. This made the judgment voidable, but not void (*Allen v. Allen* (1947) 182 P2d 551.).

The date when jurisdiction would have been perfected was the date of service of the divorce process. The date of service was September 17, 1974. (Pet. Brief, 89a). What Col. Morton did thereafter to change domicile is irrelevant. It is clear from the law, however, that notwithstanding his subjective intent to eventually relocate, Col. Morton retained his original domicile throughout his military career, at least until he took objective steps to become an Alaskan. As is obvious from the record of Col. Morton's failed attempts to become a Floridan, mere subjective desire is not enough to change domicile. However, his objective acts in 1974 were in opposition to his now subjectively proclaimed intent to become an Alaskan in May of 1974. On or about September 16, 1973, Col. Morton told the Air Force he was an Alabaman and so was able to avoid a personal expense in moving his wife and children to that state (Pet. Brief, 54a, 85a). Thus, at least as of that date, he appears to be an Alabaman. He continues to conduct himself as such by filing tax returns there in 1974 (for 1973), and 1975 (for 1974) (Pet. Brief 93a). Such an act is for a member of the

military a claim of domicile (50 U.S.C.A. 574), barring all other taxing jurisdictions from taxing his income or personal property. From all the objective evidence then, Col. Morton was a domiciliary of Alabama at the time of service of the divorce process.

B. Minimum Contacts

Even if the court finds the subjective after the fact claim of Col. Morton to be a non-domiciliary of Alabama to outweigh his objective acts contemporaneous with the date of service of the divorce process, his course of conduct and the circumstances of the opposing party are such as to give the State of Alabama jurisdiction. On this concept of jurisdiction, the ruling of *Kulko vs. Superior Court* (supra) is controlling. In that case the court considered the unilateral activity of Mrs. Kulko in moving to California herself and later being joined by the children at the expense of the father who was offering visitation, insufficient to permit the mother to call upon California courts to rewrite a separation agreement as to support and custody.

The facts in this case are clearly distinguishable from *Kulko* in terms of the purpose of the defendant. On similar facts, the State courts have held the limitations of *Kulko* to be inapplicable. In this case Col. Morton did not simply comply with one of those civilities of a divorce too often observed in the breach, visitation. As observed above he deliberately stated he considered the State of Alabama to be his residence, gave custody of his minor children to his wife, and shipped them off to Alabama at government expense. (It is interesting to note that Judge Miller in the Circuit Court seems to misunderstand the role of the second parent in relation to children in that he refers to "Mrs.

Morton and *her* two sons . . ." (emphasis added) (Pet. Brief 3a). Thus, Col. Morton intentionally made his wife and their children domiciliaries of the State of Alabama. This was not the unilateral act referred to in *Hansen v. Denckla* 357 U.S. 235. Col. Morton's separation agreement drafted contemporaneous with shipping his wife and their children back to Alabama referred to reasonable visitation rights (Pet. Brief 63a). Combined with his purposeful act of declaring himself to be an Alabaman in securing government funding to move his wife and his minor children to Alabama, it is obvious he intended to use the services of the state of Alabama including, if necessary, the protection of its courts as to his visitation rights. Col. Morton obviously anticipated that if he did not support his children, either his wife or the state of Alabama would, and not on a temporary basis but throughout their minority. The choice of Alabama as the forum for a divorce can hardly be called the unilateral act of Mrs. Morton. Add to this the fact Col. Morton invoked the protection of Alabama domicile under 50 U.S.C.A. 574 by paying his income taxes there for 1974, the inference that he purposefully availed himself of the laws of Alabama becomes even stronger.

Two cases where state courts have viewed similar situations and distinguished *Kulko* are *In re Marriage of Lontos* (1979) 152 Cal. Rptr. 271 and *McGlothen v. Superior Court* (1981) 175 Cal. Rptr. 129. In *Lontos* and *McGlothen* as in this case, the wife had a substantial contact with the forum state prior to the marriage. In both cases the conduct of the husband and father in the state of residence made it practically impossible for the wife and children to do other than return to her former home in the forum state. In both cases it should be added that the wives

and minor children ended up receiving Aid for Dependent Children under Title IV-A of the Social Security Act, apparently because of the failure of the father to provide for his children.

The *Lontos* case (supra) identifies in *Kulko* a second and separate ground for rejecting Alabama as an appropriate jurisdiction. *Lontos* requires that we must determine that "The husband's activities must be of such quality and nature that it is 'reasonable' and 'fair' to require him to conduct his defense in" (Alabama). (*Lontos* p. 278) In making this determination, the court in the *Lontos* case permits us to consider the alternative forums for litigation.

This review as to fairness is, according to *Kulko*, to be based not on a mechanical test; rather the facts of each case must be weighed to determine whether the forum is fair. Still, even though each case must be weighed individually this court cannot shelter itself by this admonition from the fact that its determination of what is a "fair forum" in his case will have a broad impact on child support enforcement. In this evaluation of "fairness" it is hoped this court will, as did the *Lontos* court, carefully consider the alternatives to litigation in Alabama. As is demonstrated by a recent study on this subject, "The Economics of Divorce: Social and Economic Consequences of Property, Alimony, and Child Support Awards", Lenora J. Weitzman, 28 UCLA Law Review 1181, divorce itself tends to consign women and the children of whom they are given custody to greatly diminished resources. If support is not forthcoming promptly, poverty and welfare dependence are inevitable. In selecting a "fair forum" the unequal economic circumstances of the custodial and non-custodial parents must be taken into considera-

tion. As is demonstrated by the facts of this case and verified by the Weitzman study (supra) even when an apparently generous amount of support is paid, when viewed against the obligations the custodial parent is expected to meet, as opposed to the resources that remain in the hands of the non-custodial parent, the ability of the custodial parent to meet the cost of litigation is necessarily limited. Thus, in this case Col. Morton claimed to pay \$500 per month voluntarily for the support of his wife and two children after their separation. Obviously this is open to dispute since a garnishment for support based on an order for that amount is the crux of this action. Even taking his statement at face value, he was left with the remainder of his basic pay, his flight pay as an Air Force Colonel, and his tax free subsistence and housing allowance. Mrs. Morton had to meet the cost of supporting herself and two minor children from the \$500 per month. Col. Morton had only himself to support from the remainder. It is submitted that Col. Morton had defenses available to him had he chosen to assert them based on his military status that could have restricted and controlled the timing of the Alabama litigation to fit his employment schedule (50 U.S.C.A. 520 et seq.). It is common knowledge that military personnel may fly space available on a standby basis on military aircraft. Thus, the cost of being physically present in Alabama to Col. Morton could have been minimal.

Compare that to the circumstance of Mrs. Morton, assuming she must personally file in Alaska to litigate her right and her children's right to support. She has lost what usually is the chief marital asset, the home, under the separation agreement (Pet. Brief, 3a) and must

now at best depend on Col. Morton's largesse which he claims is \$500 per month to support herself and two children. In addition she must retain Alaskan Counsel, and make suitable custodial arrangements for her minor children in Alabama while she litigates their rights in an Alaskan court. Having secured a final decree of divorce in Alabama, she is no longer a military dependent and no longer entitled to "space available" transportation to Alaska. In that litigation in Alaska as in Alabama the demands of Col. Morton's employment permit him to adjust the timing of hearings and to prevent entry of a judgment by default, if he asserts those rights (50 U.S.C.A. 520 et seq.). Obviously when weighing what is "reasonable" and "fair", given the several purposeful acts of Col. Morton previously referred to, the Alabama Court is proper.

It should be noted this court in *Kulko* and the circuit court in this case (Pet. Brief, 19a) have suggested the Uniform Reciprocal Enforcement of Support Act to be a make weight in balancing the rights of each party to permit both parties to have access to a fair forum. Unfortunately it does not work that way either in theory or in practice. As this court has alluded to in *Jones v. Helms* (1981) 107 S. Ct. 2434, and as petitioner has stated in detail in its brief (Pet. Brief, 17) in practice the Uniform Reciprocal Enforcement of Support Act is not a particularly effective method of obtaining or enforcing support. As Prof. David Chamber has documented in his work "Making Fathers Pay", Univ. of Chicago Press, 1980, obligated parents who cross state lines are providers in only about a third of the cases where support is due while those who remain in the jurisdiction regularly pay child support in almost 60% of the cases where it is owed.

Even in theory, when examined structurally it in effect denies the "obligee" as fair a forum as the obligor. It tilts litigation toward the obligor. It requires not merely filing an action and serving process as was the case in this divorce, but filing an action or petition in the court of residence (Section 11, RURESA), a finding by this court of residence that there is a basis for finding a duty of support (Section 13, RURESA), certifying this fact, and forwarding the matter to the responding court (Section 18, RURESA). The responding court must then docket or file the matter a second time (Section 18, RURESA) and notify the prosecutor (Section 18, RURESA). He must then obtain jurisdiction over the alleged obligor, and schedule a hearing in and among all other civil and criminal matters on his calendar (Section 18, RURESA). In the hearing to determine the obligation of support, if any, the obligee is not entitled to the protection of the laws of the initiating jurisdiction. Instead, the support duties under the law of the responding jurisdiction will be presumed to be the applicable statutes and social policy (Section 7, RURESA). If this court is concerned about unilateral acts of either party controlling the litigation and creating an unfair forum to try the issue of support, it need only look at the impact of applying this act to this case. Mrs. Morton under the Revised Uniform Reciprocal Enforcement of Support Act is required to docket this case twice, the petition of support is subjected to judicial scrutiny in two states. The obligor is in effect claiming he can pick the forum whose laws and social policy will control the amount of support and the custodial parent and the children would be required to depend on the calendaring and diligence of a prosecutor who resides many

thousands of miles from her, who she has never met, who knows of her circumstances only what is on a petition that may by the time it reaches him (or her) be literally months old, and who confronts in court a flesh and blood adversary with the local law determining what must be paid to a foreign jurisdiction. It is amazing that it works at all. But it is submitted that it in no way offsets the imbalance in resources of the litigants to substitute URESA for the fair forum provided here by the Alabama courts. The mere delay in the process alone denies the wife and children fairness.

C. Quasi-in-Rem Jurisdictions

The circuit court in its opinion discounts the applicability of the concept of quasi-in-rem jurisdiction to this type of case (Pet. Brief, 15). To have such jurisdiction, the property attached must relate directly to the cause of action (*Shaffer v. Heitner* (1977) 433 U.S. 186). This test is met by the character of the obligation established. In establishing support, the amount of the paycheck is directly related to the amount of the order. It is not merely the fund from which a contract or tort judgment may be met. Rather it is one part of the verbal formula used in setting support (see the California version of the Uniform Support of Dependents Act, Sec. 246 Calif. Civil Code). Because of its crucial nature to support in dicta in *Diaz v. Diaz*, 568 F.2d 106 the 4th Circuit has suggested that jurisdictional attachment might be a basis for a support order.

Nor is the 4th Circuit the only circuit which recommends quasi-in-rem jurisdiction. Although the Federal Circuit in this case considers quasi-in-rem jurisdiction as be-

ing an inappropriate basis for this support order (Pet. Brief, 16a), it does consider *Vanderbilt v. Vanderbilt*, (1957) 354 U.S. 416 as a guide concerning the basis for jurisdiction (Pet. Brief, 11a), and it offers the Uniform Reciprocal Enforcement of Support Act as a procedural device to obtain a support order (Pet. Brief, 19a) Jurisdiction in *Vanderbilt* (supra) was secured by sequestering Mr. Vanderbilt's property in New York. There was no evidence he was present in New York, or even personally served. The original URESA statute and its revised 1968 version (RURESА) both contain a provision authorizing jurisdictional attachment as an alternative to personal service (See 19(b) 39(a) RURESА). The leading text on this Act and its revisions, "Inter-State Enforcement of Family Support" 2nd Ed. by Brockelbank and In fausto, pub. Bobbs Merriell enthusiastically endorses this procedure. They state on page 50 that failure to use it is something less than diligently prosecuting the case. It is difficult to reconcile Judge Miller's conclusion as to quasi-in-rem jurisdiction with his citation on *Vanderbilt* and his recommendation of URESA.

Amicus curiae recognizes one must also have jurisdiction over the debt to be attached. This requirement has also been filled in this case. Contrary to the position of the majority in the circuit court (Pet. Brief, 15a), it is Alabama law that a salary obligation may be attached where the employer does business (*Orroz v. Orr*, (1978) 364 S. 2d 1170). It should be added that not only is this the law in Alabama but is the rule in the United States and has been since 1899 (*Rock Island v. Sturm*, (1899) 174 U.S. 710, *Taylor v. Taylor*, (1969) 254 N.2d 445). The test of jurisdiction over the paycheck is met. Were this

court to determine that in fact a paycheck, its amount, and payment therefrom, directly related to setting an adequate spousal and child support order, certainly a logical correlation, the test for quasi-in-rem jurisdiction would seem to have been met.

D. Estoppel

21 Corpus Juris Secundum, page 162 states: "A party will be estopped to question the courts jurisdiction if he . . . accepts benefits resulting from the court is exercise of jurisdiction."

Admittedly, Col. Morton resisted throughout the history of this litigation accepting this divorce decree except as to the divorce itself (Pet. Brief, 87a, 89a, 90a, 91a). However, although he claimed to have met his obligation to his ex-wife, Alabama claimed otherwise and in process fair on its face, garnished his pay for child support (Pet. Brief, 91a). Respondent did attempt to persuade the Air Force Finance Division to not honor the garnishment (Pet. Brief, 38a, 39a, 40a, 41a). He, however, made no attempt, at least on the record to intervene with the Alabama courts to stop the garnishment for spousal and child support, notwithstanding that at this time he was acting on the advice of counsel (Pet. Brief, 30a). Yet under 50 U.S.C.A. 523 he could have objected to the jurisdiction of the Alabama Court and at least temporarily halted the seizure of funds. He failed to do so it is submitted, because to do so could well have placed him in violation of Air Force regulations concerning the support of minor children Air Force Regulations 35-18 Para-

graphs 3 and 5(b). The allegations that support the garnishment in Alabama, also can be construed to constitute an allegation of non-support under appropriate Air Force Regulations. (Air Force Regulations 35-18 Paragraphs 3, 3(b) and 5(b). If in fact the judgment in Alabama is void, as Col. Morton contends, he would have been obligated to provide a sum that would have exceeded the support order (Air Force Regulations 35-18 Paragraph 5(b)). By stopping that orders enforcement he would have had to live within the rather harsh prescriptions of his employer. (This is not to say that in any way the Air Force provided Mrs. Morton with an alternative "fair forum". At the most it could have discharged Col. Morton administratively (Air Force Regulations 36-2 Paragraph 4) or by court martial (10 U.S.C. 894, 933). No funds to Mrs. Morton or the children would have resulted from this process.) By not stopping enforcement but rather by collaterally attacking that order in this proceeding he has lived in the best of all possible worlds. He has provided, however grudgingly, support for his minor children under a court order that limits his liability. He has avoided by meeting the order in this manner, the embarrassment of a claim of non-support and an investigation thereof, or a requirement that he met the Air Force standard until he got a valid order. He has been permitted to complete his twenty years of active duty which qualifies him for a retirement check, and now sues the Air Force to get his money back. Given the fact that, at least on this record, the judicial procedure involved here not only permitted him to remarry but also to complete his required military service with an unblemished record, he should be estopped from challenging the jurisdictional basis of that order.

III.

**Dicta In The Circuit Court Opinion Is Contrary
To Constitutional Law Concerning
Garnishment Of Salaries.**

There is a suggestion in footnote 10 on page 16a of Petitioner's Brief that the whole concept of garnishment of wages based on jurisdiction of the employer is invalid because the wage obligation is not garnishable in the state of this judgment unless the judgment debtor is also present in that state. Such is not the law in the state of Alabama (*Orrox v. Orr* supra), contrary to the statement of the Circuit Court (Pet. Brief, 15a). Nor has it been the law in the United States since 1899 (*Rock Island Line v. Sturm* (1899) 174 U.S. 710). While not the issue on which the circuit court opinion turned it is offered by that court as an alternative basis for an adverse decision and could, unless addressed, be a basis for liability, assuming for arguments sake, this court did not discover its erroneous character.

Since it is doubtful this would happen, it would not normally be necessary to rebut what is dicta, however erroneous. However, if this dicta is permitted to stand unchallenged, it could affect future litigation on this subject. It is requested that this dicta be addressed by the court and this response is offered in support thereof.

Rock Island Line v. Sturm (supra) recognizes the concept that debts belong to the creditors to whom they are payable. However it carries this analysis one step further and recognizes a right of action in the judgment creditor against any debtor of the judgment debtor, in any forum the judgment debtor could himself have brought

suit. Later claims by the judgment debtor against the garnishee may be defended based on the full faith and credit clause (Art. IV, Sec. 1 U.S. Constitution). So long as adequate notice of the garnishment is given the judgment debtor he has been accorded due process of law and his wages may be surrendered to the judgment creditor or rather the agent of the garnishing court. (*Harris v. Balk* (1905) 198 U.S. 215). In the context of family support full faith and credit applies only to installments of support that have accrued and became final and non-modifiable as a matter of state law (*Sistare v. Sistare* (1910) 218 U.S. 1, *Yarborough v. Yarborough* (1930) 290 U.S. 202, *In re Marriage of Crookshanks* (1974) 116 Cal. Rptr. 10), or because a subsequent proceeding under state law rendered the accrued installments final and non-modifiable. (*Griffin v. Griffin* (1946) 327 U.S. 220). This because only such sums constitute a judgment for the purpose of applying the full faith and credit doctrine to enforcement process of the trial court. (*Sistare* (supra)).

Even with those limitations and the protections provided by the Consumer Credit Protection Act (15 U.S.C. 1673) the concept has proven highly effective in protecting the rights of abandoned spouses and children. Thus an employee of Signal Oil who left Illinois after his divorce and took up residence in Texas still found he had to meet the order of the Illinois Court (*Taylor v. Taylor* (1969) 254 NE 2d 445), as did a New York obligor residing in Texas but employed by Texaco (*Texaco Inc. v. Louis Le fevre* (1980) 610 S.W.2d 173) as did a former citizen of the District of Columbia employed by ARAMCO in Saudi Arabia (*Pray v. Pray* 5 Bureau of National Af-

fairs Family Law Reporter page 2945). We also have the example of Mr. Orr of *Orrox v. Orr* (supra).

It should be noted that due process requirements of *Sniadack v. Family Finance Corp.* (1979) 395 U.S. 337 are met by the prior hearing which resulted in the order of judgment for support. (*Wyshak v. Wyshak* (1977) 138 Cal. Rptr. 811; Marriage of Crookshanks (supra) or in the hearing that makes such installments final (*Griffin*). Thus contrary to implications in the circuit court opinion, this case (*Sniadack*) is inapplicable. (Pet. Brief, 10a).

The suggestion in footnote 14 of the majority opinion of the Circuit Court (Pet. Brief, 12a) that these post judgment orders should be fed into the URESA system, would work an injustice on the judgment creditor and the public that all too often is supporting this judgment creditor. Even if the system were far more effective than it is (see description above under "minimum contacts") this would give the obligor a unilateral right to pick and choose the forum in which to enforce the order, contrary to the reasoning of *Hansen v. Denckla* (supra). It would not provide in many instances a "fair forum" or any forum for enforcement, since there may be no other forum for garnishment. Thus in *Taylor* (supra) and *Texaco Inc.* (supra) a Texas domicile would have shielded the obligors from paying had the Illinois and New York plaintiffs been required to sue in Texas. In *Pray* (supra) there was no other "fair" forum between the District of Columbia and Saudi Arabia.

Finally, to require relitigation of the support award as suggested by Judge Miller of the Court of Claims

every time the obligor moves is deprive the obligee of due process in a very fundamental sense. Having successfully and fairly litigated the issue of support the obligee would now be deprived of support by the unilateral act of the obligor. In the words of Justice Rutledge in footnote 4 of the dissent in *Griffin* (supra):

“Because delay so often results in loss of substantial rights, the effect frequently will be also to make impossible the ultimate as well as the immediate collection of what is due; and to substitute a right of life-long litigation for one of certain means of subsistence”.

It is requested this court repudiate the dicta in the circuit court opinion and affirm the holdings in *Taylor* (supra) and *Orrox* (supra).

CONCLUSION

For all the foregoing reasons, the Petitioner's prayer to reverse the ruling of the Court of Claims and dismiss this action should be granted.

Respectfully submitted,

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March 1984.

No. 83-916-CFX
Status: GRANTED

Title: United States, Petitioner
V.
Allan Wayne Morton

Docketed:
December 2, 1983

Court: United States Court of Appeals for
the Federal Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Carroll, Kaletah N.

Entry	Date	Note	Proceedings and Orders
1	Sep 23 1983		Application for extension of time to file petition and order granting same until December 2, 1983 (Chief Justice, September 26, 1983).
2	Dec 2 1983	G	Petition for writ of certiorari filed.
3	Dec 30 1983		Brief of respondent Allan Wayne Morton in opposition filed.
4	Jan 4 1984		DISTRIBUTED. January 20, 1984
5	Jan 23 1984		Petition GRANTED. *****
6	Jan 25 1984		Record filed.
7	Feb 8 1984	G	Motion of the Solicitor General to dispense with printing the joint appendix filed.
8	Feb 27 1984		Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.
11	Mar 13 1984	G	Motion of the Solicitor General to permit Michael W. McConnell, Esquire, to present oral argument pro hac vice filed.
12	Mar 12 1984		Brief amicus curiae of Sacramento County CA, et al. filed.
15	Mar 8 1984		Order extending time to file petitioner's brief on the merits until March 12, 1984.
16	Mar 15 1984		Brief of petitioner United States filed.
17	Mar 19 1984		Motion of the Solicitor General to permit Michael W. McConnell, Esquire, to present oral argument pro hac vice GRANTED.
18	Mar 20 1984		SET FOR ARGUMENT. Wednesday, April 25, 1984. (4th case)
19	Apr 10 1984		Brief of respondent Allan Wayne Morton filed.
20	Apr 11 1984	N	Motion of Bruce Warren Rush for leave to file a brief as amicus curiae filed.
21	Apr 18 1984	X	Reply brief of petitioner United States filed.
22	Apr 17 1984		Motion of Bruce Warren Rush to file a brief as amicus curiae withdrawn.
23	April 25 1984		Argued